S. Hrg. 99-812, Pt. 3

REPORT OF THE SENATE IMPEACHMENT TRIAL COMMITTEE

HEARINGS

BEFORE THE

SENATE IMPEACHMENT TRIAL COMMITTEE UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

THE IMPEACHMENT OF HARRY E. CLAIBORNE, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, OF HIGH CRIMES AND MISDEMEANORS

AUGUST 15 TO SEPTEMBER 23, 1986

Part 3 of 4 Parts

Printed for the use of the Senate Impeachment Trial Committee

U.S. GOVERNMENT PRINTING OFFICE
64-053 O WASHINGTON : 1986

For Sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk,
United States District Court
By

UNITED STATE OF AMERICA,
Plaintiff,
v.
HARRY E. CLAIBORNE,
Defendant.

Case No. CR-R-83-57-WEH

Reno, Nevada
August 7, 1984
9:30 o'clock a.m.

VOLUME V

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE WALTER E. HOFFMAN, and a jury.

For the GOVERNMENT:	STEVEN A. SHAW, ESQ. WILLIAM C. HENDRICKS, III, ESQ. JAN N. LITTLE, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ. WILLIAM J. RAGGIO, ESQ. J. RICHARD JOHNSTON, ESQ.
Reported by:	CAPITOL REPORTERS Certified Shorthand Reporters BY: MARY E. BELL, CSR #98 108 West Telegraph Street Carson City, Nevada

RENO, NEVADA, TUESDAY, AUGUST 7, 1984, 9:30 A.M.

-oOo-

THE COURT: I believe Judge Claiborne was on the witness stand. Mr. Goodman, do you have something?

MR. GOODMAN: Yes, he was, your Honor. Before he takes the stand again outside the presence of the jury we would like to move to strike that portion of Judge Decker's testimony where he characterized Judge Claiborne's response on the Judicial Ethics form as being illegal or unlawful.

THE COURT: I don't remember the precise words used by Judge Decker which, of course, was last week sometime; but I will attempt to cover that in the charge if the record shows exactly as you say. You said that he used the words illegal --

MR. GOODMAN: Or unlawful.

THE COURT: Or unlawful.

MR. GOODMAN: Perhaps during the recess I'll be able to meet with the reporter and get the exact area so I could report to the Court.

THE COURT: I don't know that our present reporter was even here.

MR. GOODMAN: Then I'll be able to call the young lady over the break and perhaps get her to read it back to me. Thank you.

THE COURT: Mr. Marshal, call the jury, if you will.

Good morning, ladies and gentlemen. Yesterday when we recessed if you recall Judge Claiborne was retained for further direction examination by Mr. Johnson for a few more questions and Mr. Johnson, just don't repeat the prior testimony.

MR. JOHNSTON: No, sir. Thank you, your Honor.

HARRY E. CLAIBORNE, THE DEFENDANT, PREVIOUSLY SWORN

DIRECT EXAMINATION (Resumed)

BY MR. JOHNSTON:

Q Judge Claiborne, I want to hand you Government's exhibit 29 which consists of three letters that were written by Jay Wright for different financial institutions. I direct your attention please to the second letter in that group. To whom is that addressed?

A To First National Bank of Nevada.

Q What's the date on that letter?

A May 22, 1980.

Q All right, sir. And the third letter?

A Dated May 22, 1980. It's addressed First Western Savings & Loan Association in Las Vegas, Nevada.

Q Did you ask Mr. Wright to send those letters?

A Yes, I did.

Q Why?

A I had bought a piece of property and secured a loan from First Western and I had secured a loan at the First Interstate Bank.

Q Was this information that First Western and First Interstate wanted to get from your accountant?

A That is correct.

Q All right, sir. Did you receive copies of those letters at the time they were sent?

A No, I did not.

Q Did you see a copy of the first letter in the group, the one to Stanwell Mortgage?

A Yes, I did.

Q Next Judge Claiborne I want to show you Government's Exhibit 10 which is an undated letter addressed Dear Frank from you. Will you tell us, did you write that letter?

A Yes, I did.

Q To whom is it sent?

A It's sent to Mr. Frank Rothman who testified in this case.

Q Would you read the letter, please?

A "Would you please try to work out a way that I could get my money from Sid's estate. For the first time in my life I am desparately in need of money".

Q Were you desparately in need of money at the time?

A Well, I think desparately was a poor choice of words. At that time I was in a financial bind, there's no question about that.

Q Over the years that Mr. Wright acted as your accountant and prepared your tax returns, had you borrowed money on occasion?

A Yes.

Q When you borrowed money in the past, did you give Mr. Wright information about the loans?

A Always without any single exception.

Q And on those occasions would you give him a copy of the promissory note that you signed?

A Yes.

Q Now, Judge Claiborne, there's been ample testimony in this case that in 1979 you cashed a number of the checks that came to you as fees for work that you'd done before you became a Judge?

A That is correct.

Q Why did you cash them instead of depositing them in the bank?

A Why did I cash them?

Q Yes sir. Why not deposit them in the bank?

A For living expenses. I mean I just did it.

Q Was it your preference to conceal the fact that you'd received those checks?

A Certainly not.

Q I want to show you now Government's Exhibit number 11. Sorry, strike that, please. Government's Exhibit 38 which is a tax refund check that you received from the treasury. Will you tell us the date on that check, please?

A July the 24th, 1981.

Q What's the amount of the check?

A $44,256.

Q Was that an income tax refund?

A It was.

Q For what year?

A For the year 1980.

Q Did you cash that check or deposit it?

A I cashed it.

Q Did that refund represent income that you had to report on your tax return for that year?

A It did not.

Q Why did you cash it instead of depositing it?

A Why did I cash it?

Q Yes.

A The purpose for which it was cashed?

Q No. Why did you not deposit it in the bank instead of cash it?

A Well, I cashed it to get the money.

Q Did you have any reason at all to conceal the fact that you'd received an income tax refund?

A I don't think you could conceal that transaction from the IRS since it was their check.

Q Now, Judge, there's been testimony by Mr. Watson that you told him that you had donated part of your library to the

University of Hawaii. Do you recall that?

A Yes, I remember hearing him say that.

Q Did you tell him that?

A No, I did not.

Q In your conversation with him about the disposition of the books in your library, was there any reference to Hawaii?

A Yes.

Q What was that?

A He was asking me for the disposition of my library and I was telling him -- I told him that I sold some of the my library to a Mr. McClarren and that Mr. McClarren in turn sold some of them or most of them to a lawyer in Las Vegas by the name of Jim Rogers and to a law firm in Hawaii.

Q But you never told him that you donated them to the university?

A Oh, no. I know nothing about the University of Hawaii.

Q Judge Claiborne, I want to hand you Defendant's Exhibit 47 which is the record book in which you made various notations and I want to show you what purports to be a photograpnic blow-up of the last three pages of that book and turn to the final three pages, please, and I'll ask you whether this appears to be an accurate photographic reproduction of those three pages?

A It is.

Q Had you ever actually compared the pages in the book with the blow-up before this moment, Judge Claiborne?

A No.

MR. JOHNSTON: We'll offer this in evidence, if the Court please, as Defendant's exhibit 47-A.

THE COURT: It will be admitted.

(Defendant's Exhibit 47-A was admitted into evidence.)

MR. JOHNSTON: Thank you, your Honor.

BY MR. JOHNSTON:

Q Now, Judge Claiborne, I want to show you Defendant's Exhibit 2 in evidence which is the financial disclosure report for the year 1980. We have a blow-up of that also. I'll show you what purports to be a photographic reproduction of the first page of that report, Judge, and ask you whether this is an accurate reproduction?

A It is.

MR. JOHNSTON: We will offer this in evidence as Defendant's Exhibit 2-A.

THE COURT: It will be admitted.

(Defendant's Exhibit 2-A was admitted into evidence)

MR. JOHNSTON: Now, let's see. I want to get both the easel and the other piece of equipment out here, if we may. I'd like to put them side-by-side.

BY MR. JOHNSTON:

Q Now, Judge Claiborne, will you take your personal financial diary, the black-covered book there, please, which is

Defendant's Exhibit 47, I believe; is that right?

A Yes.

Q Will you turn to that portion of the book that would be the final page of the book, please, where you've recorded receipts in 1980 and would you read, please, the first item that you recorded in 1980?

A January 4, 1980, $42,52.34, Pete Echeverria, (VanSickle), deposited Pioneer, hand-delivered.

Q All right, sir. Would you read the next item, please?

A August 6, 1980, $888.30, Jim Brown, deposited Pioneer.

Q And the third item?

A August 15, 1980, $37,500, Wyman Estate, cashed Golden Nugget.

Q All right, sir. And the final item?

A November 10, 1980, $7,071.71 Jim Brown. That's the only notation.

Q Thank you very much, Judge. Now, Judge Claiborne, I want to ask you this. Did you intentionally file a false 1979 income tax return?

A No.

Q Did you intentionally file a false 1980 income tax return?

A No.

Q Did you receive a $75,000 loan from anyone in 1978?

A No.

Q Did you intentionally file a false financial disclosure report for 1980?

A No.

Q -- for 1978, I'm sorry?

A No.

MR. JOHNSTON: Thank you very much, that's all.

THE COURT: Cross-examine, Mr. Hendricks?

MR. HENDRICKS: Thank you.

CROSS-EXAMINATION

BY MR. HENDRICKS:

Q Judge Claiborne, you ran your law office for something in excess of 30 years, did you not?

A That's correct.

Q In that regard you were a private businessman?

A That's correct.

Q While you were an attorney and a private businessman you became familiar with capital gains transactions, didn't you?

A Yes.

Q And isn't it fair to say that in particular that you obtained 12,000 shares of Golden Nugget stock in about 1962?

A That is correct.

Q And you sold that stock in 1977?

A That is correct.

Q And that stock was reported as a capital gains on your 1977 income tax return?

A That is correct.

Q Now after you became a Judge in 1978 and during the period from 1978 through 1980 you became further familiar with tax and tax cases, did you not?

A I became further familiar with tax cases, yes.

Q Do you recall the tax case of the United States v. Jerry Burgess in January of 1979?

A Yes, I do.

Q Did you sit as the presiding Judge in that case?

A I did.

Q Was that an evasion case?

A Well, it was principally a fraud case but the counts were stated as evasion because he had defrauded an elderly couple of some $200,000 and he did not declare it on his income tax.

Q So part of that trial, did it not, Judge, related to the consequences which flowed from the evasion of taxes on a 1040?

A Yes. He did not declare any of the $200,000 that he defrauded these people of.

Q Do you recall the tax trial in about March of 1979 of Delfus Ben Johnson?

A Yes, I do.

Q In Portland, Oregon?

A Yes.

Q And that was a false statement, was it not?

A I think it was one count of evasion, if I remember right. I could be wrong. It's three counts, I remember that.

Q That was about a two-week trial, wasn't it, Judge?

A Yes, it was.

Q And it involved in part the consequences of filing false statements by Delfus Ben Johnson on his income tax returns, standard form 1040?

A Yes. That's true, very close parallel to this case also.

MR. JOHNSTON: Your Honor, excuse me, I have an objection to the use of the consequence means as being involved in the trial. To me the word means consequence if you're found guilty and it's not clear to me what the question means.

THE COURT: If Judge Claiborne needs any further explanation, that's fine. But he apparently did not.

BY MR. HENDRICKS:

Q Judge Claiborne, do you recall sitting as the presiding Judge in the about March of 1979, in the case of United States v. Ricky Hanna?

MR. JOHNSTON: I'll object to any further questions along this line on the grounds of relevancy, your Honor.

THE COURT: Overruled. I don't know what the relevancy may be at the present time.

MR. JOHNSTON: May we have a standing objection so I don't have to pop up every time we get these questions?

THE COURT: Yes.

BY MR. HENDRICKS:

Q Do you recall sitting in that case?

A I sure do.

Q That was a tax case, wasn't it?

A That was a tax case where your department had investigated the Freemont Hotel for a year and a half and spent approximately $1 million of the taxpayers' money and they couldn't develop a case and you reached down and got some coin wrapper and charged him with income tax evasion in order to make a record that you had completed the investigation of the --

Q Excuse me. My question called for a yes or no answer and don't give the ladies and gentlemen of the jury a speech.

THE COURT: Please answer the question.

THE WITNESS: The answer is yes.

BY MR. HENDRICKS:

Q Do you recall Unites States v. Ethyl Gates in about April of 1979?

A Yes, and I'd like to say I acquitted Mr. Hanna.

Q Do you recall, sir, that the case involving Ethyl Gates was a false statement case?

A It was a case of over 80 counts. She was head of the license division of the county and she had received kickbacks on 80 some-odd occasions from a man who was in business and she did not declare any of them.

Q Do you recall, Judge Claiborne, the case, sitting in the case, a tax case of the United States or taking a plea in the tax case of the United States v. Floyd Pattison in October of

1979?

A I don't recall the Pattison case at all.

Q Do you recall the case in December of 1978, in January 1979 the tax case of the United States v. James Hamilton?

A Yes, I do.

Q You were the presiding Judge in that tax case, were you not?

A That is correct.

Q Do you recall, sir, being the presiding Judge in the United States v. Harold Mitchell and Delores Mitchell in December of 1979?

A I barely recall the name of those people. I seem to recall they pled guilty. I'm not sure of that.

Q Judge Claiborne, do you recall being the presiding Judge in the Unites States v. James Berg, a tax case?

A Yes, I recall that case.

Q In January of 1980?

A Yes.

Q Do you recall being the presiding Judge in the case of the United States v. Victor Vorheese in 1980?

A Yes, sir.

Q Do you recall the the case of United States v. William Clyde Demming?

A Yes, I do.

Q Do you recall --

A Oh, wait a minute, I do not remember that. Demming, William Clyde Demming? The name sounds familiar but I don't recall sitting on that case.

Q In 1980, the tax case United States v. Augustine Gallo?

A Yes, I handled that case.

Q Do you recall being the presiding Judge, Judge Claiborne, in the case, tax case of United States v. us Harry Mangrum in 1980?

A Yes, I remember that.

Q Wouldn't it be fair to say, Judge Claiborne, that by 1980 you were very familiar with tax law and very familiar with questions regarding taxation?

A Let's put it this way. That by the time that a trial would begin and would be over and any particular tax trial I would be familiar with the law that pertained to that case because it was my responsibility to instruct the jury.

Q Can you answer my question yes or no? By 1980 would it be fair to say that you were very familiar with tax law and questions regarding taxation?

A Well, I would be familiar with the particular question involved in the case, Mr. Hendricks, naturally. And I would safely say that by the time I instructed the jury I would be thoroughly familiar with the tax law pertaining to that situation which was before the Court.

Q Would it been fair to say, Judge Claiborne, that as a result of sitting in all of these tax trials you were very sensitive to the importance attached to the filing of 1040's?

A I would say I was very sensitive to the rights of the accused in their dealings with the IRS always. I would be sensitive to all of the legal propositions and I would be sensitive to the proper presentation of the case in all of those areas.

Q Weren't you also aware, sir, of the consequences that flowed in all these cases or many of these cases from the filing of false 1040's?

A Well, I don't think you need a Judge to answer that. All of us know that you're in trouble if you violate the law with reference to your tax returns.

Q Yet you want the jury to believe that in light of all of this background that you filed these 1040's consistently without ever even looking at them them, sir?

A Do you I want them to believe that?

Q Yes, sir, do you want them to believe that?

A Yes, most assuredly I want them to believe that because it's a fact and I think Mr. Wright verified that.

Q Do you think it's reasonable in light of the substantial knowledge that you had in tax law, in tax practice?

MR. JOHNSTON: I'll object on the ground that it's argumentative and invades the province of the jury, your Honor.

THE COURT: Well, I think it has relevance, gentlemen, in view of the rather extensive experience that Judge Claiborne has had in the trial of tax matters.

MR. JOHNSTON: I suggest, your Honor, that the proper question is not do you want the jury to believe something but what is a fact. You can ask questions about fact but not what he expects the jury to believe.

THE COURT: Well, that's not the present question.

MR. JOHNSTON: There's a whole string of those questions.

THE COURT: I don't understand this last question that started do you want the jury to believe. I will ask that you refrain from that, Mr. Hendricks, but the last question did not apply to that.

BY MR. HENDRICKS:

Q Judge Claiborne, let's go back, if you will, to the beginning of your law practice back in the late '40's. Could you tell us whether you paid anything for the practice when you began?

A No, I did not.

Q And you didn't pay anything for the good name or the good will aspect from an accounting aspect of that business, did you?

A No. I left the District Attorney's office and I just opened up an office and there was no previous good will.

Q And you did not pay anything for a client list?

A No, I did not.

Q And you didn't pay anything for a file of briefs and legal research at the time you began your practice?

A No, sir.

Q Now, at about the time you started your practice you had I suppose like anybody certain business expenses, you had to buy things, a piece of equipment, furniture, things of that sort; would that be fair to say?

A Yes, sir.

Q And over the years starting in the late '40's and continuing on you had from time to time occasion to buy books and other library materials, did you not?

A Yes, I did.

Q And you started, did you not, sir, depreciating those books and taking deductions on your tax returns for the depreciation on that capital equipment over the years?

A Yes, I'm sure that Mr. Wright took depreciation.

Q Now with respect to furniture and fixtures, you had occasion from time to time over the years, didn't you, Judge Claiborne, to buy furniture and other things for your business?

A Absolutely.

Q And those things, the furniture and fixtures, were depreciated over the years and deductions were taken for that capital equipment on your tax returns?

A Absolutely.

Q With respect to leasehold, that is your interest in the lease on the buildings you occupied, you made leasehold improvements over the years, did you not?

A Yes, I did.

Q And you took depreciation and deductions for those leasehold improvements?

A Yes, I did.

Q Did you also on your income tax returns take deductions for other standard business expenses such as phone bills and supplies and things of that sort?

A Oh, sure.

Q And you also deducted other expenses such as salaries for Miss Quintana and James Brown, your secretaries?

A Yes.

Q Now coming forward in time to 1978 before you took the bench, there's no question, is there, about the fact that you had an agreement to split fees with Annette Quintana?

A No question about it.

Q And James Brown. And after that in 1978, that income that you got was reported on Schedule C as ordinary income, was it not?

A Absolutely.

Q And that's the same way that your income had been reported for all of those 30 some years that you had been in private practice?

A Absolutely.

Q During that period of time, if I understand, you knew, did you not, Judge, the difference between regular income that you had always reported, Schedule C, and capital gains income?

A I did.

Q Judge, let me show you Government's Exhibit 2. That's the 1978 income tax return. If you would turn to the 13th page their, would you agree with me that in 1978 --

A Wait a minute, page 13?

Q Well, it's a page which contains, relates to your library. At the top of the page it has the number 12 and then it contains the notation complete library.

MR. JOHNSTON: I'm going to object, your Honor, if the material is going to be read from this return because my understanding is it's not in evidence.

THE COURT: It's not in evidence but the question is, I assume, going to be directed to the capital assets that were either partially or fully depreciated.

MR. HENDRICKS: Yes, sir.

BY MR. HENDRICKS:

Q Judge Claiborne, would you agree with me that's as of the end of 1978 your library was completely depreciated?

A Yes.

Q If you'd turn two more pages to the schedules of equipment there, would you agree with me that at the end of 1978 your furniture and equipment was completely depreciated?

A Yes.

Q And if you would turn one additional page, would you agree with me that at the end of 1978 your leasehold improvements were completely depreciated and abandoned?

A Yes, that's correct.

Q So by the end of 1978, Judge, it's correct, is it not, and you would agree regarding legal fees and that everything else in the offices had been disposed of by sale or abandoned or given to people?

A Legal fees?

Q Yes, sir.

A I would have to answer no because I had accounts receivable.

Q Do you recall testifying regarding this matter in April of this year, Judge?

A Yes, I do.

Q Do you recall me asking you the question,

> "Q. So by the end of 1978 you had agreed regarding the fees and everything else in the office had been disposed of by sale or abandoned or given to people?"

Q And your answer,

> "A. That is correct."

A Yes. I thought you were talking about fees received during that tax year.

Q Now, Judge Claiborne, you testified at the very beginning of your testimony yesterday that you believe that you represented more indigent clients, meaning I guess penniless people who have very little if any money, than any living lawyer in Nevada?

A I think so.

Q Do you mean to suggest by that, sir, that you were underpaid for your efforts during that period of time?

A Thank I was underpaid?

Q Yes, sir, underpaid.

A Whether I was underpaid never occurred to me. It was part of my obligations in those days and I met them.

Q Let me show you, if I might, a document that's been marked for identification as Government's exhibit number 1 for your reference.

MR. JOHNSTON: Could we know what that is, counsel?

MR. HENDRICKS: 1977 income tax returns and refer to them if you like.

BY MR. HENDRICKS:

Q Isn't it true that your gross billings were $375,752.

MR. JOHNSTON: Objected to as irrelevant. The exhibit is not in evidence and the amount received is irrelevant.

THE COURT: The exhibit is not in evidence but he may ask the question.

MR. JOHNSTON: My objection is based on relevancy, also, your Honor.

THE COURT: I think it may be relevant.

THE WITNESS: My gross, did you say?

BY MR. HENDRICKS:

Q Your billings, $375,752. If you will look at the Schedule C there?

A I'm looking. Yes, my gross was $375,752.21 and my net was $197,283.

Q Did that $375,752 come from indigent clients?

A In 19 -- I would never --

MR. JOHNSTON: I would object, your Honor.

THE WITNESS: You can bet it didn't.

BY MR. HENDRICKS:

Q That's about $1,000 a day, isn't it, Judge, more than $1,000 a day?

MR. JOHNSTON: I'll object to that on the grounds that this assumes a fact not in evidence, namely that the gross fees were for Judge Claiborne's servicing of a loan.

MR. HENDRICKS: Mr. Johnston raised this question about the Judge representing indigents when it turns out he received $1,000 in billings --

MR. JOHNSTON: There's evidence that there were a lot of other lawyers in that firm, your Honor.

THE COURT: I will admit the testimony. That does not necessarily mean that Judge Claiborne did or did not represent many indigent clients and furthermore he has not confined it to 1977. I assume his prior answer was applicable to a period of years. But I will permit it.

BY MR. HENDRICKS:

Q Now, Judge, do you have Government's exhibit 2 there, the 1978 return?

A Yes, I do.

Q And you were in practice for about eight months of that year?

A That is correct.

Q You went on the bench the 1st of September, 1978?

A That is correct.

Q And you billed for '78, $240,876.23?

A That is correct, that was my gross.

Q And that's more than $1,000 a day for the eight months that you were in private practice during 1978.

MR. JOHNSTON: Excuse me, Judge, I object again.

THE WITNESS: And the net is 65,000.

MR. JOHNSTON: Excuse me, Judge.

THE WITNESS: Excuse me.

MR. JOHNSTON: I don't control my own client, your Honor. I wanted to object on the ground that the question assumes that the bills were entirely for Judge Claiborne's personal services.

MR. HENDRICKS: He can bring this out on redirect examination.

MR. JOHNSTON: The question assumes a fact not in evidence. That's the basis of the objection.

THE COURT: You may answer the question what happened to fees that came in there either to Mr. Brown or Mrs. Quintana. I will permit it.

BY MR. HENDRICKS:

Q Now, Judge Claiborne, would you agree with me that when you became a Judge you experienced a drastic drop in income?

A No, I would not. Not a drastic drop. I see by this return that my net in '78 was 67,000 and I would say my income for the next year while I was on the bench was much higher than that.

Q Do you recall testifying about this matter, Judge, on April 3rd of 1984 when I asked you,

"Q. Judge, Claiborne, after you became a Judge" --

THE COURT: Give him the page.

MR. HENDRICKS: 3282.

MR. JOHNSTON: May I have a moment to find it, please? Thank you.

BY MR. HENDRICKS:

Q Do you recall my question, Judge Claiborne,

"Q. After you became a Judge your income
dropped substantially, did it not?
A. Drastically."

A Yes, on an average basis it did.

Q Would you agree with me that that drop in income constituted motive to falsify your 1979 and 1980 income tax returns?

A You're wanting me to say whether or not that constituted a motive?

Q Yes. I want you to answer the question.

A I think motive is a matter that the jury should decide.

Q Now at the time, Judge Claiborne, that you took the bench and your salary dropped as a result of taking the federal bench you had remaining certain large expenses which did not change, did you not?

A Yeah. I would say that for the year 1979, that my expenses probably stayed just about the same. Not entirely because --

Q What was do you recall your judicial salary per annum?

A 50,000, I think 54,000.

Q And '79 about the same?

A About the same.

Q And during those two years you were, were you not, Judge Claiborne, paying alimony in the amount of 21,000?

A That is correct.

Q And you had other expenses relating to your life style which you had developed over the years which remained more or less the same?

A Yes, and I was receiving income from my private practice and other income other than that.

Q Judge Claiborne, you by your own admission later became what you called desparate for money, right?

A Yes, there was a short period that I was in a financial bind. As I said, the word desparate I think was unwisely chosen.

Q Was it a false statement?

A No, it wasn't. But --

Q An exaggeration?

A Yes, slightly. I was in a financial bind, there's no question about that. I had been negotiating a sale of my property and my home and the property next to it. I had reasonable assurances that at least from negotiations it would be sold. On the basis of that I made financial commitments for our property and the negotiations finally fell through and so I was a couple, three months, three months at the most in a financial bind because of the financial commitments that I made.

Q Let me ask you a couple questions if I might about the tax year 1979. Jay Wright prepared your tax returns for that year, did he not?

A He did.

Q How much were you paying Jay Wright a year for his tax services?

A I don't know.

Q You have know idea?

A I have know idea. I do not recall.

Q Just jumping ahead a little bit, Judge Claiborne, you have a clear recollection of virtually everything that happened on the 31st of August, 1978. I believe your testimony was extensive on that day.

MR. JOHNSTON: Excuse me, that's not a question.

BY MR. HENDRICKS:

Q Is that a correct characterization?

A Well, I hope it's absolutely accurate. I think I also said yesterday that our minds play tricks on us sometimes. I'm not infallible. Some things I remember, some things I don't.

Q You have no idea of how much you paid Jay Wright for his tax services over the years, a 30 year relationship?

MR. JOHNSTON: Excuse me, it's already been asked and answered, your Honor.

THE WITNESS: If my life depended on it I couldn't tell you what I paid him. I think, I think a number of years he did my work for $500 a month, I think. Then I think it was raised to 75 plus an additional fee for doing my return and I think that was 350. That continued a number of years and at the time that I quit my practice I could not tell you, Mr. Hendricks, and I'm honest with you.

BY MR. HENDRICKS:

Q Isn't it true, Judge Claiborne that you paid him nothing for 1979?

A I think I testified that he didn't bill me for 1979. I don't know whether I did or not, I've never checked, I've never gone through my checks to see whether I paid him or not. I hope I did but if I didn't, he certainly has never called me. He's never sent me a bill for '79.

Q Oh, he's called you, hasn't he, sir?

A Oh, he's called me but he never called me about a bill. If he would have sent me a bill I would have promptly paid it.

Q Judge Claiborne, if you never answered his telephone calls how would you know what he called you about?

MR. JOHNSTON: Objected to as argumentative, your Honor.

THE COURT: I will permit it.

BY MR. HENDRICKS:

Q Judge Claiborne, let me show you what's been marked for identification --

MR. JOHNSTON: Excuse me, your Honor, he has answered it.

THE WITNESS: If he never answered his telephone calls then I would not know. Is that what you're saying? I've answered his phone calls.

BY MR. HENDRICKS:

Q Government's Exhibit 28, let me show you that. If I might, for the ladies and gentlemen of the jury, I'll show you a blow-up of exhibit 28.

Now it's true, isn't it, Judge Claiborne, that early in 1980 you sent this exhibit, Government's exhibit 28, to Jay Wright so that he could write to these financial institutions on your behalf?

A Yes. This was a request that he write Stanwell Mortgage Company a letter in accordance with my request.

Q And you'll note at the present time it has writing down the side, the right side bottom which has been identified by Mr. Wright as his handwriting. That handwriting on the right side bottom was not on the letter at the time you wrote it, was it?

A No, it wasn't.

Q The only figures which were on Government's Exhibit 28 at the time you sent it was this total of numbers down the middle bottom of Government's Exhibit 28; is that correct?

A I would say that's correct.

Q And that total for the year 1979 which is certified by you as your tabulation and "from my deposits and authentic" is this figure 46,000 or $45,371.93; is that right?

A That's correct.

Q Now, sir; would you agree with me, Judge Claiborne, that of this list of items that you provided totaling at 45 or $46,000 that only about $22,000 of that, $22,332 are really legal fee income, that the remainder it turns out are not?

A According to Mr. Wright's sanitization of it, it appears that's the figure he reached.

Q Why do you use word sanitization?

A Well, it appears here that he has checked these figures out and arrived at a correction on the right-hand side. That's what it's all about.

Q So he conducted apparently an analysis of the figure and learned that some of them were not, in fact, legal fees; he took those out and he got $22,332?

A Yes, at some later time he determined that the correct figure was 22,000.

Q Now you have your book there, Defense exhibit 47, I believe, in front of you?

A That's correct.

Q In you will take a look at your book you'll see that for the 1979 year there are two pages plus one additional entry which cover all of your checks for 1979?

A That's correct.

Q Not very difficult, just two pages plus one additional item, right?

A Very simple.

Q And you kept that in your home?

A Yes, I did.

Q Now if you had your book which had these little items on it why would you send Mr. Wright figures which had $41,000, your book, why would you send him this letter which only identifies half of that amount?

A In my -- my system was, as I have explained, that I would take and I would receive the checks, I would take a slip of paper on a rack that I had on my desk. I'd write the pertinent information about it on these slips. I would put the slips in my desk drawer in my chambers in an envelope that I had for that purpose. Periodically I would take them out and I would take them to my home, I had a home office in my dwelling and I would transfer these slips to a specific envelope that I had in my desk drawer in my home and then from time to time I would record those slips in my book.

When Stanwell Mortgage requested a letter from my accountant. I went home, I took the letter home and I had misplaced the envelope with my slips in it and I, in fact, did not find the envelope until I moved on April 1st from my home.

Q Now --

A -- just let me finish. So I couldn't find the slips. So I took my bank statements and I went through and I picked out a number of items in my bank statement that I thought were fees and I listed them and I totaled them and I sent it to him. I was quite sure in selecting these items from my bank statements that these were deposits for fees.

And I sent it to him. They never were sent to him for the purpose of arriving at my income for tax preparation purposes. When he received it, he got the letter. When I moved on April the 1st, in the moving process of my office we found the envelope. I had misplaced it. I took it to my home, new home at Pinehurst and then I eventually recorded the slips in my book.

Q Judge Claiborne, yesterday when you were talking about your book, Defense exhibit 47, I believe you testified that it was true and accurate in every regard and maintained by you in the normal course in kind of a bookkeeping practice that you developed?

MR. JOHNSTON: Excuse me, I'll object, that's misstating the evidence. There wasn't any such testimony from Judge Claiborne about normal course of practice.

THE COURT: Well, I don't recall the precise words that may have been used, but Judge Claiborne may correct Mr. Hendricks if he cares to.

BY MR. HENDRICKS:

Q Let me restate the question. Judge Claiborne, is it your testimony that you, upon the receipt of legal fee income for 1979, you'd make out this little slip and you'd put it in an envelope; is that right? That was your practice?

A Yes, that was my practice.

Q And it was your practice, was it not, then, to take the envelope to your home where you maintained your book, Defense exhibit 47, and you would put from time to time the little slip entries into the book; is that right?

A That is correct.

Q But it occurs that for purposes of most of the exhibits which relate to 1979 that you had lost the slips and consequently the book was completely incorrect until the 1st of April, 1980; is that right?

A If I had lost a slip?

Q That you had misplaced the slips for all of the period that these various Government exhibits in early 1980 take place and that's the reason why you provided Mr. Wright with only half of your real legal fee income?

MR. JOHNSTON: Excuse me, I think counsel may have misspoken himself. He said 1980.

MR. HENDRICKS: Your Honor, I'm trying to conduct cross-examination here.

THE COURT: Overruled.

THE WITNESS: Your first premise is incorrect, Mr. Hendricks. This envelope would have been misplaced in the early part of '79. At exactly what point I do not know but as I testified before I specifically recall that when I wrote Mr. Wright the April 11th 1980 letter, that none of the '79 slips had been recorded in my book, none of them. They were all still in the envelope.

Q So you say you lost the slips --

A Because I used the slips to add up the amount of income from my private practice before I became a Judge to use in the letter. I specifically recall that.

Q You had lost the slips in early '79?

A I lost the slips in, I would say, January or February in 1980.

Q Perhaps I'm confused, Judge. Didn't you say just a few moments ago that you lost the slips in 1979?

A Well, I hope I didn't.

THE COURT: Well, that's what you said.

THE WITNESS: Well, it's 1980.

BY MR. HENDRICKS:

Q Which is it, Judge, 1979 or 1980?

A 1980.

Q Then in time for the April 11th letter you were able to calculate the true figure again; is that right?

A Yes.

Q In any event you agree with me that Government's exhibit 28 at the time you provided it to Mr. Wright, contained what turned out to be for legal fees 22,332, according to his later calculations?

A Yes, that's what he calculated later on.

Q And the total figure that you gave him was 45,371 and then written over 46,371?

A   Yes, I give him a figure that was about 5,000 more than I actually took in in fees.

Q   Now, Judge Claiborne, after that -- do you have Government's exhibit 29 in front of you?

A   29?

Q   29, sir. Those are the three letters that Mr. Wright wrote.

A   No, that's 28, sir. I'm sorry, just a minute, let me look. Yes, I have it.

Q   Now Mr. Wright's figure for the earnings from private practice for 1979 come directly from Government's exhibit 28?

A   No question about it.

Q   Mr. Wright did exactly, precisely what you told him to do?

A   Yes, correct.

Q   He didn't appear to misplace anything?

A   What?

Q   It doesn't appear that he misplaced anything or made any mistakes of any sort in this regard?

A   No, he took my exact figures and wrote the letter.

Q   Right. And that was consistent with his normal practice, was it not, Judge? You had to provide the information, Mr. Wright received it and as your accountant he did what you told him?

A   That is not correct. That's not correct.

Q Would you agree with me, Judge Claiborne, that in the spring of 1980 that Mr. Wright began the process of preparing your income tax returns for 1979 which return was later filed in June?

A Yes. I would take it that he began on April the 10th of 1980. That was my first phone call from him about my tax matters that year.

Q And, Judge Claiborne, you had conversations with Mr. Wright, did you not, as to the exact figure to be put on your return, that is the exact figure --

A Are you talking about telephone conversations?

Q The exact figure of legal fee income?

A No. That's not the way it occurred. On April the 10th --

Q Excuse me, sir. That called for a yes or no answer. Do you recall testifying about this matter on April 3rd of this year, page 3255?

MR. JOHNSTON: May I have just a moment, please?

BY MR. HENDRICKS:

Q At line 20,

> "Q. Didn't you, after May 22nd, have conversations, further conversations with Mr. Wright as to the exact figures as to what should be put on your 1979 tax returns?
>
> A. Yes, I did."

A No, that's wrong. After May 22nd?

Q Do you recall the colloquy that I just read, the question and the answer?

A That's incorrect.

Q Your testimony is incorrect?

THE COURT: Now may I ask, Judge, do you say that the transcript is incorrect?

THE WITNESS: That's correct. I'm saying that the transcript may be correct but that is incorrect. I did not talk to him about the amount that I owed after May 22nd.

THE COURT: What I want to know is you do not dispute the accuracy of the transcript, your dispute is that either you made an erroneous answer at that time or --

THE WITNESS: My answer would have been incorrect.

BY MR. HENDRICKS:

Q Now you don't know because I guess you didn't have it at the time when exactly Mr. Wright put these notations down in which he as you say sanitized Government's exhibit 28?

A I have know idea. I do not know the time period with which he did it.

Q I notice down here that there's a word INT. Do you take that to mean interest?

A I would take it to mean interest.

Q Is that in your handwriting or Mr. Wright's handwriting?

A No, sir, that's in his handwriting, all of those notations on the right-hand side.

Q Let's go through them if you don't mind just for purposes of clarity. Then directly above INT we have the word fee, f-e-e. Is that in your handwriting or his?

A His.

Q Now how would he know that something was a fee or wasn't a fee unless you told him?

A I don't know. I do not know how he arrived at that at all.

Q Then we have the notation hear TCD $10,000, INT $622.17.

A I have seen that. That makes no kind of sense at all.

Q Is that in your handwriting?

A No, it's in his.

Q Then we have $10,622.17 and under that $10,000 fee. Is that in your handwriting?

A No.

Q Then directly under that we have sale of -- do you have the original there?

A No, I don't. I can see from here.

Q Can you make out this last word over here, sale of something?

A No, I can't.

Q Well, isn't it true, sir --

A Hand it to me and maybe I can figure it out. That looks like to me sale of plane, I'm not sure. It's in his handwriting.

Q Do you recall his testimony, Judge Claiborne, that he called you, went over the figures and as a result of that he wrote these notations down and that's how he calculated 22,332 as a result of the conversation with you?

A No.

Q That is not what he testified to?

A He may have -- no, I don't recall that he testified to that.

Q Isn't that what happened, Judge Claiborne?

A No, it isn't.

Q Didn't you know at the time you had this conversation with Mr. Wright that the real legal fees were more than double of what you told him, 22,332?

A More than double what I told him? I never in my life told him that my fees were $22,000, never. I think it's crystal clear that I told him that it was 46,000 right there. My calculation apparently was incorrect, but I told him that the fee income which proved later on to be some $5,000 more than I actually took in.

Q Judge Claiborne, let me show you Government's exhibit 31. Let me see if I can find the blow-up. That's in your handwriting, isn't it?

A It sure is.

Q You never in your life told him 22,332 was the figure down here in your handwriting, private law practice before

Judgeship?

A $22,332.87.

Q Judge Claiborne, this information on Government's exhibit 31 here, Government's exhibit 31, the original actually has other pages, does it not?

A Yes.

Q It has more than just this blow-up page?

A Oh, yes.

Q And it has a lot of specific information that you have provided on there for the express purpose of allowing Mr. Wright to prepare your 1979 income tax return?

A That was the express purpose of it.

Q And the reason, fundamental reason for Government's exhibit 31 being prepared was because he called you and asked you to provide him with this information?

THE COURT: 30 or 31?

MR. HENDRICKS: 31, your Honor, I'm sorry.

BY MR. HENDRICKS:

Q In other words, so he --

A Yes, he called me and asked for the information and as he testified he gave me the figure of 54,000 and then the 22,000 figure.

Q He told you that as a result of having gone over the list you provided him earlier in the year, that he calculated right to the side the words as a result of his conversation with you and his analysis of those transactions, he had calculated 22,332.87; is that correct?

A That was not what he said.

Q Judge Claiborne, when was, according to your testimony, when was this document, Government's exhibit 31 prepared?

A The night of May the 1st.

Q When was it that you had send him your envelope wherein you stated $41,000?

A April 11th.

Q And on that letter, Defense exhibit 1, you told him $41,000; is that right?

A That's correct.

Q That was about three weeks or two and a half weeks between the 11th and the night of the 1st of May?

A Three weeks.

Q Had you forgotten half of your legal income in two and a half weeks?

A Forgotten?

Q Yes, had you just forgotten about half of it?

A No, it never occurred to me. He called me on the telephone in the afternoon -- I called him on the telephone and I told him that I was going to Los Angeles, that I had been assigned to Los Angeles and that I didn't know when I would get back and I said should we apply for an extension before I leave and he said that will not be necessary. He said, "We will go ahead and do it the same way we did last year's return".

Q Did you ever tell him --

A Please let me answer your question.

Q You just answered my question. Now, Judge --

A I have not answered it.

Q It's my turn to ask the questions. You'll get a chance all you want. Let me ask you this, Judge.

A I am not making a speech, Mr. Hendricks.

MR. JOHNSTON: Excuse me, your Honor, may the witness be permitted to answer the question?

MR. HENDRICKS: Your Honor, may it please the Court, I've given him substantial opportunity to answer the question.

THE COURT: I think he's answered the question.

MR. JOHNSTON: I don't think he completed his answer.

THE COURT: You may bring out on redirect anything that may have been omitted.

THE WITNESS: Now, just a minute.

BY MR. HENDRICKS:

Q Now, Judge, you've got to wait for a question.

THE COURT: Wait a minute.

THE WITNESS: I thought you said I could finish.

THE COURT: On redirect you may.

BY MR. HENDRICKS:

Q You prepared this on the night of the 1st of May of 1980 it's your testimony and you put down the 22,332 and it's your testimony you did that because Mr. Wright told you that?

A Exactly.

Q Didn't you tell him, "Oh, no, it was really 41,000, I just sent you a letter two weeks ago that says that"; did you ever tell him that?

A No.

Q But you say you've seen your Defense exhibit 1, the $41,000 in your file a number of times, you were familiar with it. How could you forget half of your legal fees in two and a half weeks?

A Mr. Hendricks, I mean apparently you people work a little different in the Justice department that I do.

Q Excuse me.

THE COURT: Just answer the question, please.

THE WITNESS: He called me in the middle of the day while I'm working after I had talked to him previously and he said, "I need other information". And I said all right. And I took a tablet and he said, "I want your earnings as a federal Judge". I said, "Jay, I brought that to you".

He said, "Oh, yeah, just a minute". He said, "Yeah, it's 54,400", or whatever the figure is there. And I wrote it down on the tablet. And he said, "I want your earnings". And I said to him, "Interest earnings, is that what you're talking about, or all other earnings?" and he said. " Well, I want your other earnings other than interest earnings". I said, "All right". I said, "I gave that to you".

And he said, "Just a minute". He said, "Yeah", he said, "That's 22,000 from your private practice".

BY MR. HENDRICKS:

Q Why did you say that's correct?

A Huh?

Q Why did you say that is correct. You had sent him a letter two and a half weeks earlier that it was 41,000 according to your version?

A He said, "Is that figure?" And I said, "Yeah, that's sounds correct". He gave it to me, I wrote it down.

Q And then gave it back to him?

A With all of the other things that he wanted. Then he said, "I want interest earnings". And I said okay. Then he said, "Any other income that you may have obtained", and he said from any other sources. So that's why the sale of the airplane is on there.

Then he went on to the next item and he said, "I want all of your medical expenses". And I said all right. And he said, "And donations". and I wrote those down in the note and he says, "Your real property tax", and I wrote that down in the note. "And your insurance", I wrote that down and he said, "Now any other", he said, "Any other item", and he said, "that you think my appropriately be a deduction". And I said all right.

So I made a note of that. So then I take that note and I start right out with the total and I said, "Federal Judge", and the amount that I had gotten, private practice, interest earnings and then I started figuring it out. I specifically recall that this was done the night of May the 1st.

Q You put down, did you not, Judge Claiborne --

A Because I worked on --

THE COURT: Judge, answer the question.

BY MR. HENDRICKS:

Q Private practice before Judgeship, $22,332.87 in your handwriting?

A That's the exact figure that he gave me. I said, "I gave that to you, Jay", and he said, "Yes, $22,332.87". I wrote it down and then I made a copy of this and put it in my --

Q Judge Claiborne, you knew, did you not, that this $22,000 was false by almost 50 percent?

A I did not know that or I wouldn't have done it.

Q Do you have Government's exhibit 3 in front of you?

A 3?

Q What's the 1978 income tax return, excuse me, 1979 income tax return.

A I don't have it.

Q Sorry, it's right here. Would you look at Schedule C there, Judge Claiborne, and tell us what the gross receipts or sales from the law practice are?

A $22,332.87.

Q You didn't put that figure in there, did you?

A Absolutely not, that's a figure he arrived at from --

Q From what you told him?

A Well, yes. He arrived at it from the 46,000 that I gave him.

Q So that Mr. Wright used exactly the same figure that was put down on Government's exhibit 31?

A That's correct.

Q To the penny, no mistakes?

A Yeah, it appears to be the exact amount.

Q Wouldn't it be fair to say from what you know and what you've seen here that in regard to putting down your legal fee income on your 1979 return that Mr. Wright followed your instructions to the penny?

A No. He didn't follow my instructions. He gave me the figure from his own reduction of the other figures. He gave that to me, I wrote them down and I gave them back to them, simple as that.

Q It's your testimony, is it not, Judge Claiborne, that Defense exhibit 1, that's the April 11th letter, was given by you through your secretary to Mr. Wright on the 11th of April, 1980?

A I absolutely know that because he had it on his desk when

I visited him that afternoon to give him another check in the amount of $2500, I saw it with my own eyes.

Q That was the visit in which you recalled exactly what was on the various parts of his desk; is that right?

A Exactly what was on his desk?

Q Yes, how many piles were there so his desk.

A I know there was three different piles of paper. I recall that.

Q What else was on his desk?

A What else?

Q Yes, sir, what else?

A Are you talking about physical objects and things of that kind?

Q Physical objects.

A I don't recall anything else being on the desk except a recepticle of some kind and I don't recall what that was. It could have been a pen set or some other, a statue or something else.

Q And how high was the first pile of documents?

A How high?

Q High high.

A The nearest to me, I sit down at the right of his desk, he's on my right, so I'm on his left when I sit down. The pile nearest me was a pile of folders, they were all folders, there were I think three or four folders. The documents in the center were all lose. It appeared to me they were different documents, a stack of documents.

The papers that were on his right were some files and some lose papers, documents of some kind that I don't know what they were. They could have been letters, they could have been statements, they could have been monthly payments or whatever, what have you, profit and loss statements, but they appeared to me to be individual documents stacked up.

Q Do you recall Mr. Wright's testimony that he never saw Defense exhibit 1 until Mr. Goodman showed it to him in 1983?

A Well, Mr. Wright stated in the last trial that he did have it and he worked with it and then he said he didn't have it and this time he said he did have it, so yes, I heard Mr. Wright say that.

Q Excuse me, that's not responsive to my question.

THE COURT: The answer, ladies and gentlemen of the jury, you may disregard to the last part in which Judge said, "Yes, I did hear him say that".

BY MR. HENDRICKS:

Q He said he never saw it until November of 1983. Do you recall Mrs. Wright's testimony that she made a careful search of the file and it was nowhere in the file and she never saw it until November of 1983 even though she was responsible for the maintenance of your file materials?

A I don't recall what her testimony was in that regard.

Q Now isn't it your testimony, Judge Claiborne, that from the 11th of April, 1980 when you provided Defense exhibit 1 you clearly knew that your legal fee income was, in fact, $41,000 in 1979?

A At the time that I gave the letter did I know it was 41,000?

Q Yes, and thereafter?

A Yes, I did.

Q With that knowledge on the 11th of April, 1980 and thereafter with the knowledge of 41,000, why would you put down $42,332.17 to Jay Wright when you knew he was going to use one half of your real figure to prepare your return with?

A For the simple reason you do not remember all of those things.

Q Now if I could show you another document here, Government's exhibit 40, that's the Ethics in Government Acts filing that you filed in 1980, is it not, Judge Claiborne?

A That's correct.

Q What was the date on which you filed Government's exhibit 40?

A May 15th.

THE COURT: Of what year?

THE WITNESS: 1980.

BY MR. HENDRICKS:

Q May 15th, 1980. And what was the figure? You signed that, right?

A Oh, sure.

Q What was the figure that you put on that filing as your client fees while in private practice?

A $23,050.76.

Q There's another example. Perhaps you can tell us if you knew as you've admitted that your real legal fees were 41,000, why would you tell the Judicial Ethics Committee that your legal fees while in private practice were only about half of that?

A I don't understand your question. You start out by saying as another example. What is the question?

Q Let me restate it, Judge Claiborne. If you had knowledge of $41,000 in income, why would you tell the Judicial Ethics Committee that you only had about half of that?

A When I left -- this was prepared on May the 1st. When I left for Los Angeles, before that I took this down to Jay. I made a Xerox copy and I put it in a large briefcase that lawyers use with my material that I would use in Los Angeles in the trial together with my financial disclosure file because I was going down there, I expected to be there for several weeks and I knew that my financial disclosure form would be due while I was there and I took this and put it with my financial disclosure file so that I could prepare it while I was down there and it remained in my file.

I came back to Las Vegas earlier than I expected to. When we got ready to prepare the financial disclosure statement I took the amount that Mr. Wright had given me off of this document, I added to it the amount of a check that I had received and had put the note in my financial file. It came to a total of $23,050.76 and I had Miss Ahlstrom type it in.

Q Now did you check your book, Defense Exhbit 47?

A I did not.

Q And you will agree, won't you, that all you had for '79, all you had to do was look at two pages for the entry and you could easily tell that your legal fee was $41,000?

A I already had it on one sheet right in the file. Why should I go up and add more figures?

Q Judge Claiborne, let me try that question again. Wouldn't you agree with me that you could have easily checked, if you'd wanted to, your own books that you'd kept meticulously, two payments and you would have known it was $41,000?

A Oh, yes, I could have checked my book. I could have added up the figures or I could have gone to the file and taken a copy of the April 11th letter to Mr. Wright, either one, but I didn't. I had this right in front of me at the time.

Q Did you check your book?

A Did I? No, I didn't check my book. If I had checked my book there would have been 41 something thousand on the return.

Q Why would you keep this book, Defense exhibit 47, so meticulously down to the penny and then never even check it on an important matter like this?

A I did check on it April of the 11th, 1980. I gave him the exact correct amount of my income taken from my slips which eventually went into the books.

Q Do you recall Mr. Wright's testimony that he never got that letter?

A Well, I've heard him testify twice with reference to that and both times it's been different. One time he said he got it and once he said he used it and then --

MR. HENDRICKS: Might I ask the Court to instruct the jury to disregard the speech. That's not responsive to my question.

MR. JOHNSTON: Excuse me, your Honor, I submit the answer is responsive.

THE COURT: I think it's partially responsive but with a speech along with it.

BY MR. HENDRICKS:

Q So it's your testimony, Judge, that you did not for purposes of your ethics filing where you said $23,000, you did not look at your own meticulously maintained personal record of your fees, Defense exhibit 47?

A Twice, Mr. Hendricks, I've told you exactly how I did it. I took the document that was right in front of me and added to it a check that I had received and added up the total and put it on there.

Q Did you go over to your book just to make sure, just to take a look? It's only two pages.

A I told you I did not.

Q You did not, okay. Did you go over to your file and look at your own Defense exhibit number 1?

A I did not, no, sir.

Q Which is the very letter that you'd sent Jay Wright, the real figure. You did not. Okay.

Now let me ask you this: With respect to the ethics in government filing, Government's exhibit 40, in which you reported $23,000, you signed it. How could you again forget one half, we're not talking nickels and dimes, Judge, one half of your legal fees for the year, when you had --

MR. JOHNSTON: Objection -- excuse me, I'll let you finish.

BY MR. HENDRICKS:

Q I'm not through yet -- when on April 11th, 1980, according to your version, you had sent a letter saying $41,000. How would you forget half?

MR. JOHNSTON: My objection is on the grounds that it's been asked and answered more than once.

MR. HENDRICKS: Not on the ethics figures, your Honor.

MR. JOHNSTON: That's precisely what he was being asked about before, your Honor. Same question.

MR. HENDRICKS: That was with respect to Government's Exhibit 3 in which he said he had 23,000. This is a different time in which he said he had 22,000.

THE COURT: He stated that he did not check Defendant's exhibit 1 which was a letter of April 11th, 1980. He has not yet been asked how and why he didn't check it. You may answer the question.

MR. JOHNSTON: Could we have the question reread, r your Honor. I've forgotten what it is, your Honor.

MR. HENDRICKS: I'll restate it.

BY MR. HENDRICKS:

Q With respect to the ethics filing, Government's exhibit 40, which you filed on the 15th of May, 1980 and reported $23,000 in income, how could you forget half of your legal fee income?

A I didn't say I forgot it. I told you how I did it. I got ready to prepare the form. In the file was a copy of this that I had taken to Los Angeles with me and brought back. I took that out and I looked. I started right out in the very beginning, clients fees while in private practice. I looked at the amount that was there. I added it to a check that I had received, totaled the amount and wrote it in in longhand which eventually went to Mrs. Ahlstrom for typing.

Q Judge Claiborne, isn't it true that the statement that you placed on that filing, Government's exhibit 40, was false?

A Of course not. It's not correct but it wasn't false.

Q Would you agree with me that it only states about half of your true legal fee earnings for 1979?

THE COURT: Isn't that a mathematical question?

MR. HENDRICKS: Yes, it is, your Honor. I'll move on to the next question.

THE COURT: I think the jury can answer that.

BY MR. HENDRICKS:

Q Judge Claiborne, you've had an opportunity to see all of the witnesses in this case. I mean you've been present in the room when all of the witnesses who have preceded you testified in this case have appeared.

THE COURT: I hope he's been present.

THE WITNESS: I can assure you I've been here.

BY MR. HENDRICKS:

Q I assume from the summary witnesses, Mr. Diaz and anyone else who has been in the courtroom who calculated tax, you are the only witness who has been in that position, are you not?

A I think that's argumentative. I don't know how I could answer that. I would say that --

MR. JOHNSTON: Doesn't make any difference how many people --

THE COURT: The witnesses were excluded from the Court and that does not mean the Defendant nor does it mean either of the expert witnesses, one of whom has testified. But that was all by agreement and understanding so that's answered.

BY MR. HENDRICKS:

Q Judge Claiborne, Defense exhibit 1, the letter that you say was sent to Jay Wright which has $41,000 figure in it, isn't it true, Judge Claiborne, that that letter was never sent to Jay Wright on the 11th of April, 1980?

A Isn't it true it was never sent?

Q Isn't it true that it was never sent to Jay Wright on the 11th of April, 1980?

A No, that is not true. It was sent by me by Miss Ahlstrom.

Q Judge Claiborne, when did you sign the 1979 income tax return?

A 1979?

Q Yes, sir. Government's exhibit 3. It may be in front of you, Judge, if you want to take a look at it.

A You mean when is it dated or when I did I sign it?

Q When did you sign it?

A I signed a blank on May the 2nd.

Q Judge, do you recall testifying about this matter in April of this year, page 3258? Do you recall me asking you the question,

> "Q. And that's the tax return which you signed on the 15th of June, 1980?
> A. Absolutely."

Q Do you recall that?

A I don't really recall it but what I meant was this is the tax return that I signed.

Q Is that testimony incorrect?

A Yes. It absolutely is incorrect, I did not sign it on June 15th.

Q The last time you testified about this matter you said absolutely and it turns out you were absolutely wrong?

MR. JOHNSTON: Objected to as argumentative.

THE WITNESS: I was in error.

BY MR. HENDRICKS:

Q You were in error. Is your testimony at this time in error?

A What?

Q Is your testimony at this time when you say May, not June, is that in error?

A I am sure that if we would review my testimony or any other witness's testimony in this case three months down the road that their would be some error.

Q Excuse me, Judge --

THE COURT: Just answer the question.

THE WITNESS: I hope there's no error, let's put it that way.

THE COURT: Let's take a mid-morning break at this time, ladies and gentlemen of the jury. Ten minutes.

(A short recess was taken.)

THE COURT: Call the jury, if you will.

All the jurors are present. Okay, Mr. Hendricks, you may proceed.

BY MR. HENDRICKS:

Q Judge Claiborne, I'd like to address your attention to the 1980 tax year at this time, June 1 primarily. It's true, is it not, Judge Claiborne that in '77, '78 and '79 you reported your legal fees as regular income?

A That's correct.

Q And you filed Schedule C's which reported that income.

Now in April of 1981, during that period of time you filed or there was filed an application for extension, was there not? And let me show you Government's exhibit 4.

A Yes.

Q Now who filed that application for extension? Did you file it or did Mr. Watson file it?

A I don't recall, Mr. Hendricks, exactly who filed it. My belief has always been that he files it. I know it was signed in his office.

Q So your answer is that he filed the application?

A My answer is that he signed it -- filed it?

Q No, that he filed the application.

A I'm not really sure who filed it. About all I recall about this extension is writing the checks and I have a recollection of being in his office when I did it.

Q Well, just to clarify this, wasn't it your testimony yesterday that he was the one that filed the application?

MR. JOHNSTON: Objection, your Honor. I'm sorry, that misstates the testimony. The testimony had to do with who prepared the application, not who filed it.

THE COURT: Well, I'll permit the witness to answer. I don't know exactly what the prior testimony was.

THE WITNESS: It was prepared by Mr. Watson and I signed it and I wrote the check for the $20,817.59. Now I do not know, Mr. Hendricks, whether I took it then and mailed it or he mailed it. But I think he did. I'm quite sure.

BY MR. HENDRICKS:

Q At the time the document, Government's exhibit 4, was filed, and you signed it, correct, before it was filed?

A Oh, yes.

Q So you knew what the figures were at the time it was filed that are reflected on the exhibit?

A Oh, yeah, I've obviously read it.

Q And there's an estimate, is there not, there, Judge, for the 1980 tax year that your tax liability would be $42,847?

A That's right.

Q So you were aware, you anticipated, according to the file, a tax liability of $42,847 as of the date of the filing?

A Yes.

Q What is the date of the filing of Government's exhibit 4?

A Well, the form is dated April 13th, 1981. I don't know when it was received.

Q So April of 1981?

A Yeah, April 13th.

Q There's no question, if I might call your attention to this exhibit, there's no question, is there, Judge, that in the year 1980 you recall receiving big items, some pretty good-sized items of legal fee income?

A Oh, sure.

Q In addition to your awareness of a possible $42,000 tax liability?

A $87,911.

Q And you have a distinct recollection of the check, December 31st, which was received in January of 1980 from Mr. Echeverria?

A Uh-huh.

Q And you recall the 37,000, for example, 37,500 received from the law firm of Hochman, Salkin & DeRoy?

A Uh-huh.

THE COURT: I don't believe he answered that.

THE WITNESS: Yes.

BY MR. HENDRICKS:

Q Then about this time that you filed the extension estimating $42,000 tax, about this time it's correct, is it not, that you decided to discontinue your relationship with Mr. Brown?

A About this time?

Q Yes, sir.

A Oh, no. I'd already decided that sometime before this.

MR. RAGGIO: You said Mr. Brown, counsel. Is that what you meant?

BY MR. HENDRICKS:

Q Excuse me, I mean Mr. Wright.

A Mr. Wright, correct.

Q So you decided to drop Mr. Wright, the person who had been your tax preparer and accountant for some 30 years; is that correct?

A Yes.

Q Was it because Mr. Wright was too busy to do your returns?

A No, it wasn't because Mr. Wright -- it was not for that reason only. I --

Q Excuse me, Judge. Was him being too busy part of the reason that you decided to drop your tax accountant of 30 years?

A That entered into my mind.

Q Did you ever tell him why during that period, 1981, let's say, did you ever tell him why you decided to drop your tax accountant of some 30 years?

MR. JOHNSTON: Objected to as irrelevant.

THE COURT: Overruled, but I will tell the jury, of course, that both Mr. Wright and Mr. Watson and any accountant or tax preparer is a private individual with whom clients can terminate their services at any time without giving an excuse as such. But I will permit the answer.

BY MR. HENDRICKS:

Q Did you tell him why?

A In specific words, no.

Q Did you ever answer any of his phone calls?

MR. JOHNSTON: Objected to as irrelevant.

THE COURT: Same ruling.

THE WITNESS: During what period of time?

BY MR. HENDRICKS:

Q During the period that he was making the phone calls, that is to say in about the spring of 1981 --

A Spring of '80?

Q No, 1981.

A 1981? No, I don't remember calling him or talking to him.

Q You have no recollection of that?

A No.

Q Do you mean to say that it could have happened but you don't remember?

A Could have.

Q So as to this question you don't remember, it may have happened, may not have happened, you have no recollection; is that fair?

A   It could have happened.

Q   Did you instruct your secretary, Judy Ahlstrom, to throw away his messages?

A   No.

MR. JOHNSTON: Objected to as irrelevant.

THE COURT: Overruled.

BY MR. HENDRICKS:

Q   Was it Judy Ahlstom's practice, sir, in your office to throw away messages from your professional advisors without your instructions?

A   I would hope not but that's a question only she can answer.

Q   Now Mr. Wright was a well known and highly respected public accountant, was he not, as of 1981?

A   Yes, he was highly respected and rightfully so.

Q   And isn't it fair to say that as of the time you terminated your relationship with him and began your relationship with Mr. Watson that Mr. Wright enjoyed a fine reputation?

A   Well, I don't think I ever had his reputation called into play anywhere, either by circumstances or in conversation. I would venture a guess. I've never discussed his reputation with anybody but I would venture a guess he enjoys a good reputation.

Q Well, didn't you know at the time in 1981 as an affirmative fact that he enjoyed a fine reputation?

A No, I don't know it as an affirmative fact. He's been a friend of mine for many years and I think if you were to ask if he had a good reputation with me, I'd have to say yes.

Q So your testimony is that he did enjoy a fine reputation?

A It would be my opinion he had a good reputation in the community.

Q You knew that he had held state wide office in his profession, in the accounting profession?

A No, I didn't know that until this trial started.

Q Now with respect to Mr. Watson, a person to whom you turned in 1980, you knew that Mr. Watson was not a CPA, did you not?

A No, I did not. Oh, I knew he was not a CPA.

Q Why, Judge Claiborne, would you discard a man like Mr. Wright for Jerry Watson?

A I was introduced to Mr. Watson as I have said before by my former wife purely by accident. When I went into his office I recognized him as having seen him in my church, though I had never formally met him. I had seen him there, I recognized his face and I immediately put the face with my church. And I said, "I know you, I've seen you at church", and he said, "That's right".

And we began to talk and I wound up in his office talking to him probably 30 minutes, maybe 45 and I liked him and I still do and we talked about a variety of subjects.

Q Did you talk about his accounting experience and his professional background?

A No, but I was -- he received some phone calls while he was talking to me and he was answering tax problems, questions to some people on the telephone and I was very impressed with the forthright and I thought knowledgeable way that he was responding on the telephone. That impressed me very much.

Q Did you ever ask him, "Mr. Watson, are you an accountant"?

A No, I never did. I assumed from the very beginning that when I walked into the office I saw the sign and it said Creative Tax Planning and then I saw brochures on his desk, I looked through them, talked about estate planning and matters of that kind and I assumed, naturally assumed that he's an accountant or he's not going to be in the estate planning business.

Q Did the name on the door, Creative Tax Planning, serve to reassure you that you were dealing with a fully professional organization? Were you reassured by that?

A Reassured?

Q Reassured that you were dealing with a professional organization when you saw the title Creative Tax Planning?

A Well, to be reassured you have to have already formed some mental conclusion and when I walked in his door I had no mental conclusion about this man at all. He had a sign on his door that didn't reassure me or assure me.

Q So you had no mental conclusion and you asked no questions about his accounting experience or qualifications; is that fair?

A I don't think I ever did. I'm sure I didn't until -- I know I didn't. I assumed from the very beginning the manner in which he was operating, the accountants that he had employed by him, the business, the people coming and going that he had a good business, he was a topright man and he talked like he knew what he was doing.

Q And after that, Judge Claiborne, you talked with him on a number of occasions and these discussions resulted in the filing, did they not, of your 1980 tax return?

A Yes.

Q Sometime later that year?

A That's correct.

Q And that was about the 15th of June, 1981?

A Yes, I would say that's correct.

Q And let me show you for your reference Government's exhibit 5.

A Yes, filed June 15.

Q Now your testimony, when you signed that return on the 15th of June, 1981, didn't you talk with Mr. Watson at the time you went over and signed that return?

A No. At the time the return was filed?

Q Yes, sir.

A No, I did not talk to him that day.

Q Didn't you see him in his office --

A No I did not.

Q -- and talk with him that day?

A No, I did not.

Q Do you recall being questioned about this matter on the 3rd of April, 1984, page 3269 of the transcript, do you recall me requesting you --

MR. JOHNSTON: Could we have just a moment, please? Thank you.

BY MR. HENDRICKS:

Q "Q. Now your view or your version is that you would have signed it really prior to the time it was filed and you never went over it?

A. Yes. Prior to the time it was filled out?

Q. That's right.

A. No. I think, I am sure it was filled out. I'm sure that when I signed it it was in the present form. I went into his office and I signed it and I asked him to mail it for me or bring it by the office, either one."

Q Do you recall those questions and those answers?

A Yes.

Q And it is your testimony today that you take did not talk to him on that day?

A I did not.

Q Was your prior testimony when you said that you did talk to him and you did ask him to send you a copy incorrect?

A No, I don't think I said I talked to him in that answer. I said I went into the office and I signed the return and asked him to mail me a copy. What I --

Q How could you ask him to mail you a copy if you never talked to him? Did you do it by sign language perhaps, sir?

MR. JOHNSTON: Oh, come on. If the Court please, we'll object to that comment.

MR. HENDRICKS: I think it's perfectly appropriate, your Honor.

I'll withdraw the question.

MR. JOHNSTON: This is an attempt to redicule the witness and we object to it.

MR. HENDRICKS: Well, I don't know how. He admitted that he talked to him and at the same time he says he never talked to him.

THE COURT: You may question the witness about why he didn't. I'm not stopping you from doing that. But let's not have any more comments from counsel.

BY MR. HENDRICKS:

Q Judge Claiborne do you recall saying, "I went into his office, I signed and it I asked him to mail it to me or bring it by the office"?

MR. JOHNSTON: Already asked and answered, your Honor.

THE COURT: Overruled.

MR. HENDRICKS: It's not direct.

THE WITNESS: I don't remember making that answer, giving that answer but I mean that answer is correct save and except Mr. Watson. I did not see Mr. Watson when I went in to sign the return. I went in and I, a lady that I later was told whose name was Peggy something took me into Mr. Watson's office, she handed me the return and I thumbed through it and signed.

BY MR. HENDRICKS:

Q And now, Judge Claiborne --

A And asked her to have Mr. Watson mail me the a copy, that is accurate.

Q Was that person Peggy, did you ever know her last name?

A I can't think of it.

Q Was it Peggy Kotecki?

A I think it is, yes.

Q Now you say, I believe it was your testimony on direct examination that you never knew at the time you signed the 1980 return that the return had this ridiculous Schedule D calculation on it and that if you'd known about it you would have never signed it. Is that your testimony?

A That is absolutely correct. In the back of my mind has always been the impression that when I thumbed through it that day that I became aware, I am pretty sure that I became aware that there was a Schedule D, that is in my mind for some reason. I didn't read it. I didn't analyze it nor did I analyze all of the return.

But somehow I have the impression that I saw a Schedule D.

Q Did you know there was a Schedule D on it at the time you signed the return?

MR. JOHNSTON: Objection, it's already asked and answered. The last question.

THE COURT: I believe he's answered it and said, yes, he did. He believes he did.

THE WITNESS: Yes, I think I have that impression, yes.

BY MR. HENDRICKS:

Q Did you know the Schedule D was there before you signed the return?

MR. JOHNSTON: Same objection, your Honor, that's tne third time.

MR. HENDRICKS: It's not clear what the time was, your Honor. I would like him to clarify the time of his knowledge.

THE WITNESS: I'm not certain, Mr. Hendricks, whether I formed the impression as to the Schedule D before or after I signed it. I think what I did was I remember that the returns were not stapled, the pages of the return was not stapled. There was a paper clip, that was held together by a paper clip. My best recollection is that she handed me the return and I signed it, then thumbed through it. It could have been the other way around but somehow in the back of my mind I have the impression that I knew that in this return was a Schedule D.

BY MR. HENDRICKS:

Q Do you have a clear recollection of whether you were aware of this Schedule D at the time the return was filed?

A A clear recollection?

Q Yes, sir.

A I'd have to be honest with you and say that I do not. But I do have an impression.

Q Was your impression?

A That there was a Schedule D in the return.

Q And that you knew about the Schedule D?

A That I knew the contents of the Schedule D?

Q Yes, sir, at the time --

A No. I would have to say that I honestly did not read the Schedule D.

Q Do you know -- all right. Judge Claiborne, do you recall me --

A I know that I didn't because I know my own temperment, Mr. Hendricks, and I know that if I had read the Schedule D, the first impression that I would have gotten that it was a work paper and not a Schedule D accomplished for filing because when I had an opportunity to study the return and I saw that Schedule D was in pencil and then had lines written down it with words that said "Type here", I got the impression that it was a work paper. If I had discovered that when I thumbed through it I am sure I would have never filed it. I would have said to this young lady, "I don't want to sign this until I talk to Mr. Watson".

Q Judge Claiborne, do you recall being questioned on this matter on April 2nd, 1984, page 3176 at line 17 and continuing,

> "Q. At the time the return was filed were you aware that it included a Schedule D which reported a capital loss from the sale of your practice?
>
> A. Yes, I did.
>
> Q. Did you at any time discuss with Mr. Watson any of the negotiations which you had concerning the sale of your practice?
>
> A. Yes, I did.
>
> Q. When did those discussions take place?
>
> A. Sometime during the period of time

when he was in the process of preparing
my return."

Q Do you recall those answers to those questions?

A Oh, yes. Yes.

Q Now, Judge Claiborne, you say when you saw the tax return, when you finally did see the Schedule D, you had the impression it was some kind of a work paper; is that correct?

A Yes, it appears to me right now to be that.

Q One of the reasons why you were, why that occurred to you was because it was the way in which it was prepared and the fact that it was in pencil with lines drawn down saying "Type here"; is that correct?

A Well, that, sir, I think is a basis for my impression that I knew a Schedule D was included in the return because of partially, probably because it was in pencil. As I said, I'm really not sure what --

Q Would you please look at the first page of that return, just the very front? That page is in pencil too, is it not?

A Yes.

Q And if you look at the second page of the return, the one that you signed?

A It's in pencil.

Q That page is in pencil?

A Yes.

Q Those figures are just scribbled in in pencil?

A Yes.

Q You could have seen that the return was just sloppily prepared and scribbled in in pencil just by looking at the third page, you didn't have to look at the signature page, did you?

A No, but it was typed and in pencil and some of it appears to be in ink, too. You know, all through it.

Q It's quite different from the returns prepared by Mr. Wright, is it not?

THE COURT: Are you talking about figures? Of course it's different.

BY MR. HENDRICKS:

Q Quite different in appearance.

A Well, I would say yes.

Q Judge Claiborne, how much did you pay Mr. Watson for his services?

A $2,000.

Q Do you mean to say that you paid Mr. Watson for this return which on its very face is scribbled in pencil three times as much as you paid Mr. Wright for the returns he prepared and all the other accounting services he prepared for 30 years? Well, $600 is a little less than a third.

A For 30 years, are you talking about the total for 30 years? This was much higher than Mr. Wright had charged for the '79 or the '78 return.

Q And this return, the 1980 return, has no Schedule C, does it?

A No, it does not.

Q In fact, it reported no Schedule C income?

A That's correct.

Q And you had been filing returns, signing returns with Schedule C's for 30 years?

A That's correct.

Q And at the time you filed the return you also had in mind, did you not, you still read at that time these large items of legal fee income in 1980?

A At the time I signed the return, that I read --

Q You knew that if somebody asked if you thought about it?

A I knew I had a large amount, certainly I did.

Q And you also knew earlier in the year in Government's Exhibit 4 there, you did estimate a pretty substantial tax liability of $42,000?

A No, I don't think that ever entered my mind at the time I filed the return what I had paid with my estimated or what the tax shown on the application for extension was.

Q It's true, is it not, Judge Claiborne, that according to Mr. Watson's calculations now this tax liability drops to $1,000 according to the return that he prepared for you?

A Well, I don't know.

Q Without looking at the return do you recall being aware of the fact that at the time you saw the return the bottom line tax liability had gone from $42,000 a couple months before and now the tax liability is shown as $1,000?

A Well, when I signed the application for extension and sent the $20,000 check in, of course, I mean the amount of income tax that I would owe was some $40,000. That was my understanding because I could see it on the form.

Q And when you filed the tax return were you cognizant of the fact --

A No.

Q You didn't even look at the bottom line figure?

A No, I did not. I have to be honest with you and say that I did not see that item at all. I did see that I was entitled to a refund.

Q Weren't you surprised, Judge Claiborne, that after 30 years you were now for the first time reporting no ordinary income?

A No.

Q That you were reporting no legal fees on Schedule C?

A I don't think that entered my mind at that time at all. None of those things entered my mind when I went in to sign the return, for goodness sake. I mean I'm in there during a lunch hour. I walk in and I thumb through it and I sign the return or I signed the return and then thumbed through it and said, "Mail me a copy".

Q Couldn't a $40,000 turnaround from what you expected to happen, wouldn't a $40,000 turnaround be the kind of thing that you would remember?

A I am telling you what I did. Now do you want me to say, "Oh, yes, I remember that, I made a mental calculation of what was on the statement. I went to his study and I studied the whole thing and I knew it was right"? That's not what it was about, that's not right.

THE COURT: Just answer his questions, please.

BY MR. HENDRICKS:

Q At the time you signed this return, this 1980 tax return prepared in pencil, did you ask a real accountant for an opinion regarding your tax liability?

A At the time that I filed this one?

Q Yes, sir.

A Well, what do you call a real accountant.

Q A person who has some experience, some training in accounting, a person like Mr. Wright?

A It was my impression that that's exactly -- a trained experienced accountant did this.

Q Did you get that impression from looking at the 1980 tax return he prepared?

A I got that impression from Mr. Watson, I know that he told me he had two experienced accountants, one of whom had been a CPA in Arizona and that she had done the major portion of the work on my return.

Q Now this 1980 --

A Was doing the major portion of my work on my return.

Q Now this 1980 return which involved a $40,000 turnaround in tax liability was the first one that Mr. Watson ever prepared for you?

A That's right.

Q And you didn't look through it in some detail to see what was going on with this first return that he'd ever prepared for you?

MR. JOHNSTON: Objected to on the ground that it's already been asked and answered.

THE COURT: I think he's answered that.

BY MR. HENDRICKS:

Q And you received, in fact, a $44,256 refund?

A That's correct.

Q Weren't you surprised by the size of the refund check?

A Yes, I was.

Q And that refund check was the check that was cashed in Las Vegas?

A That's correct. I immediately went down, when I received it went down to Mr. Watson with it.

Q Now with respect to cashing of checks, Judge Claiborne, in the 1970's, that is before September of 1978 before you took the bench, where did you have bank accounts?

A 1978?

Q Before 1978.

A First National Bank and Pioneer Citizens Bank.

Q Did you have any accounts at Nevada Savings Association?

A Yes.

Q And First Interstate, was that a bank that maintained an office in downtown Las Vegas?

A Oh, yes.

Q And Pioneer Citizens --

A It used to be First National Bank.

Q And the Pioneer Citizens was a bank that maintained an office in downtown Las Vegas?

A Oh, yes.

Q And you had accounts down there?

A Yes.

Q How about Nevada National?

A No account there.

Q Did you maintain certificates of deposit or other items with that bank?

A Yes.

Q So you had some dealings with Nevada National?

A Yes, at one time.

Q And Nevada Savings Association, I think you may have already answered?

A Yes.

Q So that's four. Was it not your practice during those years, that is before you took the bench, to deposit checks into your bank account when you received them from legal fees?

A Oh, yeah.

Q And isn't it fair to say, Judge Claiborne, that you always deposited checks you received from legal fees into your bank account?

A Yes.

Q So it was a firm practice that you had developed over the entire period of your law practice in Las Vegas?

A Yes.

Q Now you would agree with me, I don't think there's any question about that, that in 1979 you, in fact, cashed a number of checks?

A Correct.

Q That constituted, did it not, a deviation from this practice of always depositing checks which you had developed over the period of your law practice, did it not?

A My practice started in 1978 when I was appointed to the bench. I began to, whenever I needed money, I no longer was in a law office, I no longer had -- I was like anybody else and I wasn't in business. When I needed money, if I had a check came in I would cash it.

Q And you'd agree with me as evidenced on Government's exhibit 42 that there were a large number of checks in 1979 which you instead of deposited as you had done prior to taking the bench, you cashed in that year, correct?

A I continued the policy that I started in '78 of when I needed money I'd cash a check, if I had one available, and I did that all the time and I used the money for my living expenses.

Q Would you agree with me that cash transactions are easier to conceal than check transactions?

A To conceal from whom?

Q Are they easier to conceal as a general proposition?

A As a general proposition? Is a cash transaction easier to conceal than a written one? I would say yes.

Q If I could address our attnetion to some particular items, particular checks, let me show you what's been marked for identification and received in evidence as Government's exhibit 9 and Government's exhibit 6. Do you see, Judge Claiborne, in Government's exhibit 9 a check for $1,000 cashier's check dated January 16th, 1979?

A A what?

Q A cashier's check from Annette Quintana for $1,000 dated January 16th, 1979?

A Yes.

Q Did you cash that check?

A I think I can save you a lot of time. All of the checks on exhibit 9 I received and cashed.

Q Well, I want to see if we can get some details regarding these checks. What did you do with the money from Government's exhibit 9, that first $1,000 check on 1/16/1979?

A What did I do with the money?

Q Yes. What do you do with it?

A I used it for living expense.

Q What particularly did you do with it?

A Well, I bought food, clothes.

Q What kind of food did you buy for that $1,000?

A Oh, for goodness sake.

MR. JOHNSTON: Objected to as irrelevant.

MR. HENDRICKS: He's testified that he used the proceeds of that check to buy food.

THE COURT: Well, if he doesn't remember all he has to say is, "I have no recollection".

MR. JOHNSTON: The question is what kind of food, your Honor?

THE COURT: Hot dogs and beans. You're not getting into the type of food?

THE WITNESS: That was his question.

MR. HENDRICKS: I want to know with some specificity what he did with these checks, if he remembers. If he doesn't remember, he doesn't remember.

THE COURT: He used it for food and clothing and you have now asked what type of food. I cannot believe that anyone would remember back that far what food he purchased and I think I'll have to insist you move away from that question.

BY MR. HENDRICKS:

Q Is it your testimony, Judge Claiborne, that you used this $1,000 check for food and clothes?

A Well, I said my living expenses, whatever was required. A lot of things entered into it. Maybe gasoline and things like that.

Q How did you carry this $1,000 check around or cash generally?

A In my pocket.

Q You see a check for $833.33?

A Sure.

Q There on Government's exhibit 6 from James Brown?

A Yeah.

Q Is that one of the checks that you cashed?

A Yes.

Q Why didn't you wait until normal business hours of the bank and simply deposit it the way you had been doing for 30 years?

A Well, I hadn't been doing it for 30 years. I mean this is the second year that I had been doing it. I took the check, I obviously didn't have in my pocket very much money and I took the check and I cashed it.

Q Did you need $833 for leaving expenses?

A I'm sure I -- well, that day did I need it? No, but I'm sure that I used it in the next few weeks. Mr. Hendricks, I have -- a great deal of the time that we're talking about in this time period, a lot of it, is that I'm also sitting in Reno, too.

Q Judge Claiborne --

A Well, go ahead. It didn't take long to run through $1000 when you're away from home.

Q Judge Claiborne, do you see the check dated February the 12th there in Government's exhibit 9, $1,000?

A $1,000?

Q Yes, sir.

A Oh, yes.

Q You cashed that check?

A Sure.

Q I believe the endorsement on the back indicated you cashed it at the Horseshoe?

A Probably.

Q That's in Las Vegas, is it not?

A It was when I left.

Q It's not in Reno?

A No, it's in Las Vegas.

Q And on the 15th, if you'd look at Government's 6, $1,106.66?

A Yes.

Q And you cashed that?

A Sure.

Q At the time you cashed this check, Judge Claiborne, were you desparate for cash?

A '79?

Q Yes, sir.

A No.

Q Judge Claiborne, do you recall being asked about this particular item on the 3rd of April, 1984 at page 3285 in, referring to the $1,106.66 check, at line 6,

> Q. Judge Claiborne, were you desparate for more money at this time?
>
> A. February of '79?
>
> Q. Yes sir.
>
> A. I don't know."

A I was not desparate for cash on that date, I can tell you that.

Q Do you see looking at Miss Quintana's checks there on the 9th of March, 1979 a check for $1,000. Do you see that check?

A Yes, they are all $1,000.

Q You cashed that check at the Horseshoe, did you not?

A Yes.

Q And a little bit later you see another check for $1,000 from Annette Quintana dated the 14th of May 1979. That was also cashed at the Horseshoe in Las Vegas?

A Right.

Q On the 31st of August 1979 I believe if you will look at the brown checks you will see a check for $2,905.90. Did you cash that check?

A August 31st?

Q Yes, sir.

A Yes.

Q At the Horseshoe in Las Vegas?

A Yes.

Q Now did you have a need for $2905 in cash for living expenses at that time, sir?

A I'm sure that I did.

Q Is the real reason that you deviated from your practice of some 30 years to conceal income from the IRS?

A No.

Q Is it your testimony, Judge Claiborne, that you would just put $2,905 in your pocket in downtown Las Vegas and be walking around the streets with that kind of cash?

A I'm not sure that I walked around the streets and I have no present recollection of how long I had the money or exactly what I did with it so I don't think I would accurately answer your question.

Q Well, would you carry or walk around with $3,000 more or less in your pocket?

A I have. I wouldn't ordinarily do it. I would say that most of time I walk around with maybe $1,000 or 1500 in my pocket. I have walked around with that amount in my pocket, though.

Q If you look at the brown checks there again on the 13th of November 1979 you'll see a check for $3,011.56 which was cashed at the Horseshoe. Appears to have been cashed at the Horseshoe. Is that consistent with your recollection?

A No, it's not consistent with my recollection but the check shows that and I'm sure that's correct.

Q Do you recall what you did with that $3,000 in cash?

A No, I can't tell you. I have an impression that I used this at my residence. I paid some employees at my residence for some construction work.

Q Wouldn't it have been safer, Judge Claiborne -- well, how did you get the money from the Horseshoe to your reesidence?

A How did I?

Q Yes, sir.

A In my pocket.

Q So you traveled from the Horseshoe directly or indirectly and got to your residence?

A I don't think I indirectly got to my residence. I think I directly got to my residence.

Q You mean you may have stopped at your chambers?

A No, I'm sure I went straight home after I left the Horseshoe.

Q Wouldn't it have been safer to deposit the money in the bank as you had done in the last 30 years?

A Nobody has robbed me yet.

Q What was the reason that you didn't deposit the money in the bank, if you had one?

A What was the reason?

Q Yes, sir, if there was one.

A I needed money obviously. I cashed a check.

Q Judge Claiborne, do you remember being questioned about this matter on April 3rd, 1984, on page 3286, line 11. Do you recall the question,

> "Q. Wouldn't it have been safer just to deposit that money in the bank?
>
> A. Wouldn't it have been safer?
>
> Q. Well, yes.
>
> A. Well, I don't know. A lot of banks are going broke."

Q Do you recall that answer?

MR. JOHNSTON: May the record show that counsel has not read the complete answer to the last question and I suggest that it be completely read?

THE COURT: Read the entire answer, if you will, counsel. I think it's more appropriate.

MR. HENDRICKS: "Q. Wouldn't it have been safer just to deposit that money in the bank?

A. Wouldn't it have been safer?

Q. Well, yes.

A. Well, I don't know. A lot of banks are going broke. I don't know if it would have been safer or not. For security reasons, yes."

BY MR. HENDRICKS:

Q Judge Claiborne, were you as of August 1980, were you desparate for cash at that time?

A August?

Q Yes, sir.

A Well, as I said before, I thought that my use of the word desperate was a poor choice of words. In August of 1980 I was in a financial bind.

MR. HENDRICKS: Excuse me just a moment.

BY MR. HENDRICKS:

Q And you agree, do you not, Judge Claiborne, with respect to Government's exhibit 10, that you wrote, "For the first time in my life I am desparately in need of money"?

A Yes, I read that a few minutes ago. I wrote that to Frank Rothman.

THE COURT: Mr. Hendricks, I think it's time for the jury to recess for lunch. In fact, it might be a few minutes beyond time. I think we'll recess at this time until 1:30. Members of the jury, you may be excused.

Court will be in recess until 1:30.

(The luncheon recess was taken.)

RENO, NEVADA, TUESDAY, AUGUST 7, 1984, 1:30 P.M.

-oOo-

THE COURT: Call the jury, Mr. marshal.

All jurors are present. All right Mr. Hendricks, you may continue.

CROSS-EXAMINATION (Resumed)

BY MR. HENDRICKS:

Q Judge Claiborne, I'd like to ask you about the money you say you put in Ted Binion's vault in 1972. That money was, was it not, placed in the vault in 1972 and left there until August of 1978 with the exception of a couple of withdrawals?

A That is correct.

Q Now during the period between 1972 and 1978 when you took the bench it's true, is it not, Judge Claiborne, that you reported a substantial interest income on your tax return for that period of time?

A Yeah, if you say so I presume so.

Q Well, I believe I've given you Government's exhibit 1 there?

A Yes.

Q Do you recall interest income that you received from the Pioneer Citizens Bank?

A Yes, I had interest I think of $4,583.66.

Q Do you recall particular items of interest income that related to your dealings with the Pioneer Citizens Bank?

A I think $1500.

Q And did you also have some interest income from, relating to the Nevada National Bank?

A Yes, I presume so.

Q And items of interest income from the Nevada Savings Association?

A Yes.

Q That interest income came from certificates of deposit or savings account, did it not?

A That's correct.

Q I'm sorry, did he respond?

THE REPORTER: Yes.

BY MR. HENDRICKS:

Q In 1978 similarly you reported interest income from Pioneer Citizens, Nevada National and the Nevada Savings and Loan, did you not?

A That's correct.

Q And wouldn't it be safe to say that the interest income from those three institutions came from certificates of deposit and savings accounts which you maintained with those institutions?

A Yes, together with a dividend from my life insurance company.

Q So you did have a practice with respect to at least three financial institutions during the period before you went on th bench of putting money in interest accruing accounts and with certificates of deposits?

A Yes.

Q Would that be fair to say? But this particular $100,000 that you say you got in 1972 and kept for six years was not in a savings account or a TCD?

A No, it was not.

Q Do you know whether the money was insured by any insurance company?

A I'm sure it was not.

Q Now in 1977, Judge Claiborne, referring to Government's exhibit number 1, you did, in fact, have a large tax liability, did you not?

A That's correct.

Q And that is about $113,434?

A That's correct.

Q And its true, is it not, that on June 16th, 1978 you sent in your return and at the time you sent in the return you had not paid the remainder, a certain amount of your tax liability?

MR. JOHNSTON: Objected to as irrelevant.

THE COURT: I will permit it but for a limited purpose. The 1977 return, of course, ladies and gentlemen is not involved in this case but may tend to show the procedures adopted by Judge Claiborne.

BY MR. HENDRICKS:

Q Let me restate the question, Judge Claiborne. So at the time, June of 1978 when you filed your return for the preceding year, 1977, you filed the return and at the time you did not pay at that time a balance due of $74,211?

A That's correct.

Q Now is it your testimony that you didn't pay the balance due in June even though you had enough money to pay the balance down at Ted Binion's vault?

A That's correct.

Q And it's true, is it not, that you didn't get around to paying that tax liability until August 31st of 1978?

A That's correct.

Q So that's about two and a half months later. So the amount remaining, the amount owed to the IRS was outstanding for a two and a half month period; would that be correct?

A That's correct.

Q And for that two and a half month period you didn't pay it even though you could have according to your testimony?

A Oh, yeah.

Q You could have at any time?

A I could have, yes.

Q When you finally did pay it, I believe you'll see Government's exhibit 34 there the amount that you were required to pay was $76,443.16?

A That's correct.

Q Now it's true, is it not, that the difference between what your liability was in June and what you had to pay at the end of August was roughly $2,232?

A About that, yes.

Q And do you know why you were required to pay that additional $2,232?

A Interest.

Q So it is your testimony that even though you had the money at Ted Binion's and could have paid it, that you waited and were required to pay $2,232 in completely unnecessary interest on that tax liability?

A Yes. I would agree with that. There would have been no interest if I would have paid it with my return.

Q If you will look at Government's exhibit 33 and I believe that's the next exhibit there that you have in front of you, that exhibit, Government's exhibit 33 shows the deposit, does it not, of the $75,000 in cash?

A Yes, it does.

Q And on the other side of the page I think you'll see -- let me just ask you if you recall that prior to the deposit of the $75,000 there was insufficient money in the account to pay the $75,000 tax liability?

A That is correct.

Q After you deposited the $75,000 in terms of paying the tax liability, what did you do?

A After I did what?

Q After you deposited the $75,000, do you have a clear recollection of what you did after that in terms of as it relates to paying the tax liability?

A I wrote the check for 75,000.

Q Do you have a clear --

A I mean 76 thousand something.

Q Do you have a clear recollection of doing that?

A I sure do.

Q Let me ask you if you recall being questioned about this matter on the 2nd of April of this year page 3188, line 25. Do you recall being asked the question by your counsel,

> "Q. Do you recall, Judge Claiborne, what you did at least with part of the moneys which you deposited in the bank immediately before you became a Judge?
>
> A. I don't have any idea. I deposited the money in the bank and --
>
> Q. Did you write a check to IRS?
>
> A. I may have."

MR. JOHNSTON: Excuse me, your Honor. Again counsel has failed to read the complete answer. There's another sentence.

MR. HENDRICKS: Your Honor, before I could finish counsel has interrupted, may I complete my recitation?

THE COURT: Keep on reading.

BY MR. HENDRICKS:

"A. I don't have any idea. I deposited the money in the bank and --

Q. Did you write a check to IRS?

A. I may have. I think I did."

A That's correct.

Q Now, sir, you say -- let me ask you this way. Did you have a conversation with Mr. Wright on the 31st of August, 1978 at about the time you deposited the $75,000 in the bank?

A Yes.

Q You discussed this very deposit with him, did you not?

A Oh, no. No.

Q Wasn't it your testimony yesterday that you had occasion to discuss with Mr. Wright on the 31st of August the deposit that you were making?

A He came into the office to bring the tax bill. I had already made the deposit. Are you talking about before the deposit or after the deposit? I'm not clear.

Q Discussions that you had with Mr. Wright on August 31st, 1978?

A He came into the office with the -- I had two telephone conversations with him before the deposit. In a personal conversation with him after the conversation the deposit was made.

Q And did you talk with him that day about the deposit of $75,000?

A Yes.

Q Did you talk to him about the fact that the $75,000 was to be used in connection with the payment of your income tax liability?

A I think what I said in the course of the conversation with him, what I said was and I may not have but I think I told him that I wrote the check in his presence, this I recall now. He gave me the statement and told me as I remember it was a carbon copy and he said to send the carbon copy or the original, I'm not sure which, I think he said the carbon copy with the check and I did it. And I'm pretty sure I did it while he was still there.

Q How many times, distinct occasions either on the telephone or in person did you talk too Mr. Wright on the 31st of April, 1978 about this deposit and the tax liability?

A That would have been the only time about the deposit.

Q That one time about the deposit?

A I think.

Q How many times did you talk to him that day regarding the payment of the tax liability?

A Three times.

Q Were those on the telephone or in person?

A The first time was by telephone. I called him and told him that I was closing my office down which I already knew and was there anything special, instructions, any particular thing that we should do as far as he was concerned. And he said no. And then he said, "Have you taken care of your" -- I think he said tax liability. And I said no. And I said, "How much is it?" And I think it was -- I think I said, "You have the tax bill", or he asked me the question, "Do I have the tax bill?" And I said, "I think you have it," because I had sent it to him to check the figures to see if they were accurate.

Q And did you talk to him on two other occasions that day regarding the tax liability?

A Then the second time I talked to him he called me and he said, "Don't send the check right now". He said, "You have to send a copy of this tax bill with it". And he said, "I will bring it down this afternoon". And I said all right. He did bring it down.

We had some conversation about it when he came down in person.

Q That would be a total of four different conversations either in person or on the phone about the $75,000 deposit and the related tax payment?

A No. I related three. I called him, he called me back and then he came down with the tax statement and we had personal conversation.

Q Do you recall, Judge Claiborne, being questioned about this matter on the 2nd of April, 1984, under oath at page 3187, the following questions and answers,

"Q. Did there come a time when you removed the remainder of the money, the $80,000 which had been left there in two envelopes?

A. The last day I was in practice, I think that would be August 30th, 1978.

Q. And what did you do with the moneys when you got them from Teddy Binion?

A. I deposited the money in my account.

Q. And was this cash that you deposited?

A. It was cash.

Q. And the deposit slip reflected the fact that you deposited the cash?

A. Absolutely.

Q. All right. And did you ever have a conversation with Jay Wright about the $75,000 deposit which you made?

A. Yes, I did.

Q. When was that conversation?

A. Sometime during the end of the year I was talking to him about some money and I said -- we were talking about the accounts of my business and he said, '$75,000, there

will be a deposit on the last day of August just before I went on the bench of $75,000',
and I said, 'That is not income'.

Q. All right. Was that the extent of your conversation?

A. That was the extent of the conversation."

Q Do you recall that testimony, Judge Claiborne, where you testified under oath that the only conversation was at the end of the year?

A Yes, that's consistent.

Q And today you recall the conversation on the 31st, three conversations on the 31st of August?

A Well, I don't see anything inconsistent with it because I did talk to him in early spring and we did talk about the $75,000 deposit.

Q Is it your testimony that when you testified the end of the year, conversation at the end of the year, you were referring to August 31st?

A No.

Q You made no reference whatsoever in that testimony to August 31st; isn't that correct?

A May not have. You're probably right.

Q Do you recall saying,

"Q. When was that conversation?

A. Sometime during the end of the year"?

A That was a specific conversation concerning the $75,000 deposit.

Q Yes, sir. Now today you recall three specific conversations on the 31st of August?

A Well, about the $75,000 deposit, no. I told you I had three conversations with him and I related the conversations. The only specific conversation relating only to the $75,000 deposit was later on in the year when I either called him to remind him that the $75,000 was not income or he called me and inquired about it, one or the other. I don't know which, whether I called him or he called me to ask about it.

My recollection is I called him. Now that is the only specific conversation that I had with him that I recall about the 75,000.

Q Now, Judge Claiborne, I think you have Government's exhibit 25-A or 25 in front of you. Perhaps you could for purposes of reference, I've also put it up here. Do you recall Mr. Wright's testimony that he made the notations "Not income borrowed to pay tax for 1975" after a conversation with you, that he must have had with you about this matter? Could you tell us, sir, looking at the left-hand corner here, upper left-hand corner? There's a figure 385-6432. Do you recognize that, sir, as your office telephone number?

A That's my office phone number he has written out beside Judy.

Q And the figure here?

A 870-0731, my home number.

Q That's your home number?

A Right.

Q That's right across the page from this notation that he made, "Not income, borrowed to pay tax for 1977". And then down next to the $75,000 figure here there's the notation "Loan". Didn't you tell Mr. Wright that that $75,000 was a loan which you had borrowed to pay tax for 1977?

A I never told Jay Wright in my life at any time that this was a loan. If I had told him it was a loan I would have told him the source of the loan. I would have told him where I got it and I would have sent him a copy of the note.

Q You have Government's exhibit 39 in front of you, sir? That's the Ethics in Government filing that was --

A Exhibit what, excuse me?

Q 39.

A I don't have it.

Q I think this is it. Let me show it to you. On the right-hand side of the document, that's the Ethics in Government form that you filed that covered the period including 1978, is it not?

A Yes.

Q And it includes, does it not, a statement on there as to various financial transactions including any loans?

A And a loan?

Q And would include any liabilities that you would have had?

A Yes.

Q And this was sent in, was it not, by you, sir, after you sent it, sent to the Judicial Ethics Committee after you had received a request from the chairman of that committee for the filing of that report?

A Yes.

Q And isn't it true, Judge Clabornee, that you intentionally misstated the amount of your liabilities on that report in order to not to disclose the $75,000 transaction?

A I had no liabilities.

MR. HENDRICKS: That's all I have, thank you.

THE COURT: Redirect?

MR. JOHNSTON: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. JOHNSTON:

Q Judge Claiborne, while you were in private practice and before you were appointed as a Judge, was it your regular practice to have your checks from fees deposited in a bank account?

A Yes.

Q Why was that?

A Well, the practice we set up.

Q Were the bank statements the primary source of Mr.

Wright's information about your fee income?

A That's correct. It was almost his whole source save and except the deposit book.

Q Now when you went on the bench did the situation change significantly?

A Yes.

Q Were you continuing to receive frequent fee checks that came in?

A Yes.

Q Frequently?

A Yes.

Q After you were on the bench?

A Yes.

Q Did you receive as many fee checks after you went on the bench as when you were in private practice?

A Of course not.

MR. HENDRICKS: Objection, asked and answered.

THE COURT: I will permit it.

BY MR. JOHNSTON:

Q Was it your intention after you went on the bench and you closed your law office that Jay, Mr. Wright, should develop the amount of your fee income from your bank deposits?

A No.

Q Were you at that time keeping your own private record of your fee receipts?

A Yes.

Q Is that the record that's been received in evidence as Defendant's Exhibit 47?

A Yes.

Q Did you have any concern, then, that if you cashed checks instead of depositing them in the bank account that this would create a problem for Mr. Wright?

A None whatsoever.

Q Why was that?

A For the simple reason that all that he wanted and all he required and, in fact, all he ever got was the amount that I received.

Q Did you have the amount in your book?

A That's correct.

Q There's been testimony about large amounts of checks that you cashed. When you cashed those checks did you carry the currency then in your pocket from the bank?

A From the bank?

Q Yes. When you cashed a check at a casino or when you cashed it at the Horseshoe, for example?

A Oh, yes.

Q You put the money in your pockets?

A Sure.

Q Were you concerned about being attacked or mugged or robbed?

A No, I wasn't concerned.

THE COURT: On what date did the bank statements stop going to Mr. Wright, do you remember, Judge?

THE WITNESS: I believe sometime in January of 1980. I believe it was about that time. I'm sure it would have been the month of January, no later than February because I recall writing --

THE COURT: All right, January or February of 1980.

BY MR. JOHNSTON:

Q Judge, you were asked questions about criminal tax cases that you presided over as a trial Judge. Do you recall that?

A Yes, I do.

Q There were a number of those cases. Was it often in a criminal tax case that you had anything to do with the technical questions of tax law which were involved? Was in a common thing in those cases?

A No.

Q What was the usual kind of issue that was involved in the criminal tax cases over which you presided?

A Filing a false statement.

Q If you can tell us generally, did it involve frequently simply a question of whether a taxpayer had intentionally omitted the reported income?

MR. HENDRICKS: Objection, leading and it's irrelevant.

THE COURT: It's certainly leading. Rephrase your question.

MR. JOHNSTON: I concede that, your Honor.

THE COURT: Rephrase your question.

BY MR. JOHNSTON:

Q Can you tell us, Judge, the typical kind of factual question that was involved in a criminal tax fraud case?

A It generally all boiled down to whether or not a defendant intentionally and willfully failed to disclose taxable income.

Q Do you recall any of those cases that involved the question of a distinction between ordinary income on the one hand and capital gains on the other?

A No.

Q Did some of those cases perhaps involve questions of deductions that were claimed which may not have been justified?

A Some may have but very few of those.

Q Now as a result of your experience in presiding over the trial of a number of criminal tax cases, did you feel that you became a tax expert?

A Absolutely not.

Q Did you feel that you were a tax specialist?

A No.

Q Going back to the time when you first opened your office in Las Vegas, Judge Claiborne, you didn't purchase a practice or did you purchase a practice?

A Oh, no. I said that before, I did not.

Q You didn't buy good will that was already in existence, did you?

A No. I opened my office, hung my shingle out and went to work.

Q You didn't purchase a clients list from anybody?

A No.

Q Did you purchase research memoranda that had been prepared?

A No.

Q Did you purchase briefs that had been written?

A No.

Q When you closed your office to become a Judge did your practice include good will?

A Yes.

Q Did it include the names and telephone numbers and addresses of a large number of clients?

A 3,000 and some odd as I remember.

Q How did you maintain those?

A Card index files.

Q In the office?

A Yes, clients' name, address in alphabetical order.

Q Had you developed a substantial body of research work and briefs and that sort of thing?

A A ton of them.

Q Now in your opinion did those kinds of things have value at the time you left the practice?

A Yes.

Q Mr. Hendricks pointed out to you that your 1978 tax return in effect wrote off tangible assets. Do you recall that, books?

A Yes.

Q Equipment, leasehold improvements?

A Yes.

Q Did that return at any point purport to write off good will, client lists, research memoranda, briefs or anything of that nature?

A No.

Q Do you have Government's exhibit 2 up there, Judge Claiborne, the 1978 return?

A Yes, I do.

Q And do you have Government's exhibit 3, the 1979 return?

A I have 2 but not 3.

Q Will you look first at Government's exhibit 2 which is your 1978 return. What's the total income reported on that return? That would be line 21 or 22, whichever it is on that return.

A The total income reported, you mean gross assets or sales?

Q No, sir. I mean on the face of the return -- may I approach the witness, your Honor?

A That's all right, I can find it.

Q It's either line 22 or 32, total income on the first page.

A I see what you're talking about. $92,340.44.

Q Now I want to show you your 1979 return which is in evidence as Government's exhibit 3 and ask you first how much is reported from salary from your judicial salary in that return?

A $54,499.92.

Q What's that figure again, Judge?

A $54,499.92.

Q Is there interest income reported in that return?

A Yes.

Q How much? On the face of the return, Judge, I think.

A What line?

Q Well, I'm not positive.

A Line 9, $4,079.25.

Q And then if I may, let me show you Defendant's exhibit 1 which is your letter dated 4/11/80 to Mr. Wright. How much income did you tell him you'd received from fees?

A $41,073.93.

Q Is that a correct figure?

A Yes.

Q Can you tell us approximately what your total income was then in 1979? Perhaps you can do this in your head roughly at least. We've got something over 54,000 for salary; is that right?

A You want me to add it up?

Q I'll give you round number, Judge, and we will make it easy. 54,000 for salary?

A 95,000 plus a few dollars.

Q 95,000 wouldn't include the interest, would it?

A No, it would be 99,000 and a few dollars.

Q And what was the total income reported on the '78 return which is not in issue here?

A $92,340.44.

Q So was your total income in 1979 greater or less than what you received in 1978?

A Greater.

Q Now, Judge Claiborne, I want you to look at Government's exhibit 28, that's your original letter to Mr. Wright with his notations. Do you recall that one, Government's 28? I'm sorry, the clerk has it. You didn't have it at all.

You see a notation that relates to the cost of the plane in the lower left-hand corner. Excuse me just a moment, Judge, let's see if we can find the blow-up of that. Here we are, this is Government's exhibit 28-A. I'll just hold this up for the moment so the jury can see it. Would you read the notation on the left-hand side over by the bottom, Judge?

A Plane cost 11,000.

Q Now I want to show you again your letter to Mr. Wright dated 4/11/80 and ask you to read what you've written in that letter about the cost of the plane?

A "I also sold my airplane in April, received $11,000. I paid 11,000 for it is so there is no profit or loss".

Q Judge, are you aware of any source other than your 4/11/80 letter by which Mr. Wright could have learned that that plane cost you $11,000?

A None whatsoever.

Q Now, Judge Claiborne, you wrote Defendant's Exhibit 1, the letter to Mr. Wright on 4/11/80, and you gave him in that letter a figure of something over $41,000 for your 1979 fees; is that right?

A That's correct.

Q And then you talked to him on May 1st on the telephone; is that right?

A That is correct.

Q May 1st, 1980; is that correct?

A That's correct.

Q When you talked with him on the telephone on May 1st did you have in your mind the fact that you had told him in the letter that the fees exceeded $41,000?

A No.

Q Did you remember that when you were talking to him on the telephone?

A No.

Q Had you read it would you have told him about it?

A Yes.

Q Did he then give back to you the $22,000 figure which finally got into the return?

A Yes.

Q In that conversation?

A Yes.

Q Did you have any recollection or any understanding in your own mind that that was not a correct figure at that time?

A Not at all.

Q And you prepared a financial disclosure report for the year 1979, did you not?

A That's correct.

Q And that's in evidence. Do you recall the figure that you put in that report?

A '83, 23,000 plus.

Q And when you filed that report, when you put that number in there, did you have any recollection at all about the $41,000 figure that you'd previously given Mr. Wright?

A I had no recollection about it at all. I didn't give it any thought. I took the sheet that I had Xeroxed and had taken to Los Angeles with me and put in my file and just took the sheet and filled out as much as I could from the sheet from my financial statement.

Q Now, Judge Claiborne, I want to direct your attention to the time when you met Mr. Watson and had further conversations with him and finally he prepared your 1980 return; is that right?

A Yes.

Q Why did you switch from Mr. Wright to Mr. Watson?

A Why did I switch?

Q Yes. Why did you leave Mr. Wright and go with Mr. Watson?

A I was impressed by Mr. Watson.

Q Why were you impressed?

A He portrayed an image to me of professionalism. As I have said before when Mr. Hendricks asked me the question, he received a phone call while I was there and I was impressed with the way he handled the party on the telephone, the calm, I believe way that he dealt with whatever the problem was. I didn't know what it was but that impressed me.

Q Did you feel or do you now feel in any sense you were discarding Mr. Wright?

A No, I never felt I was discarding him. The last conversation that I had with him on the day that I closed my office, the main conversation at that time was that he regretted to see me go on the bench.

Q Was that a friendly conversation?

A It was very friendly and I then quickly told him the reasons that I was going on the bench and I was excited about it and looking forward to it and in the course of conversation

I said to him, "Go ahead and finish up this year. In other words, go ahead and do everything like we've been doing it before", and I said, "After this year all I will need is a tax preparer", and he knew that. So I never felt that I was discarding him. I mean Jay Wright needed me like he needed another head.

Q Why do you say that?

A Because he had a very, very good practice. Very fine practice with more clients than he could adequately take care of. That's a fact.

Q Did you leave Jay Wright and go to Jerry Watson because you wanted to accomplish some improper purpose in your 1980 return?

A No. When I was in the first time I was impressed by him. When it came close to preparing my return, I called him up and I asked him for an appointment and I went down and I told him I wanted him to do my return.

Q Do you still have the 1979 return there, Judge Claiborne? That would be Government's exhibit 3 or thereabouts?

A Yes, I have it.

Q Will you look again at the signature line on that and tell us what date appears opposite your signature?

A 6/15.

Q Now, Mr. Hendricks read to you from a transcript of the prior trial at page 3258, beginning at line 17. I'm not sure if he started there but I think he said and this has reference to the 1979 return. What he read to you was this,

"Q. And that's the tax return which you signed on the 15th of June, 1980?"

A. Absolutely."

Q I want to direct your attention, Judge Claiborne, to some testimony that you gave at that trial prior to that. This is at page 3126 of the transcript, beginning at line 13 and going through line 21. I'm going to ask you whether you were asked these questions and whether you give this testimony.

"Q. Now did you ever see the 1979 return before it was filed?

A. I don't think so.

Q. All right. Did you sign the return in bank?

A. Yes."

THE COURT: Are you talking about the '79 return now?

MR. JOHNSTON: '79 return.

THE COURT: I thought you were questioning Judge Claiborne about the 1980 return.

MR. JOHNSTON: I was a moment ago but I'm talking about the 1979. I'm sorry I confused you.

THE COURT: Let's ask the question about '79. You were questioning about 1980 and then you want to read him some testimony from the prior trial and that relates to a different year.

MR. JOHNSTON: I'm sorry if I confused anyone, Judge. I directed his attention to the '79 return now.

BY MR. JOHNSTON:

Q And so there's no confusion, Judge Claiborne, are you looking at the 1979 return?

A Yes. He asked me to look at the '79 return and I looked at it and I told you it was my signature.

Q What is your present testimony as to whether you signed that return in blank or not?

A Yes, I did.

Q When you signed it in blank did you write on --

A I didn't sign this return in blank, I signed a blank return.

Q It wasn't filled in yet?

A That's correct.

Q That's what you mean by signing in blank?

A That's right.

Q You signed a form that hadn't been filled out?

A That's correct.

Q And is that the form you signed?

A Yes, on May the 2nd.

Q What date did you write on it when you signed it?

A June 15th, that's when the extension was up.

Q Does this matter as to which Mr. Hendricks was questioning you and as to which he read to you from the transcript at the prior trial at page 3238, and let me read that again so there's no question about that, he was questioning you about the 1979 return,

"Q. And that's the tax return which you signed on the 15th of June, 1980?

A. Absolutely."

Q Now I want to direct your attention to other testimony which you gave earlier in the trial. I'm referring now to page 3256 of the transcript beginning at line 13 and continuing through line 21.

"Q. Now did you ever see the 1979 return before it was filed?

A. I don't think so.

Q. All right. Did you sign the return in blank?

A. Yes.

Q. All right. Do you know whether you actually did sign the return?

A. I think on May 5th or 6th, somewhere in that neighborhood."

Q Were those questions asked of you and were those your answers at the prior trial?

A That's correct.

Q Now I'm back to the 1980 return again, Judge Claiborne. Do you have a recollection of signing the 1980 return?

A Yes.

Q This is the one that's prepared in your office?

A Yes, I do.

Q Where did you sign it?

A In Mr. Watson's office.

Q Did you talk to someone when you went in to sign it?

A Yes.

Q Can you tell us for sure who that was? Did you know the person that you talked to?

A No, I did not.

Q Did the person give you a name at that time?

A No.

Q You testified I think that you talked to someone named Peggy; is that right?

A I said that I later learned that the women's name was Peggy.

Q Are you sure now who it was you talked to by name?

A No.

MR. HENDRICKS: I object to this, your Honor. He's been asked and answered this question now and he's apparently now attempting to impeach his own witness. I think impeacning his own witness is inappropriate for redirect examination.

MR. JOHNSTON: It's explicitly premitted under the rules, your Honor.

THE COURT: I thought so. Do you wish to look at the rule, Mr. Hendricks?

MR. HENDRICKS: No, your Honor.

BY MR. JOHNSTON:

Q As you sit there now, Judge Claiborne, are you sure that the person you talked to is named Peggy?

A No.

Q Have you ever seen the person that you talked to since that time?

A I'm not sure. I don't think so.

Q Mr. Hendricks asked his questions about Jerry Watson's fee. What was the amount of the fee again?

A $2,000.

Q When you first had an understanding with him that he would prepare the 1980 return, did you have an agreement about what his fee would be?

A No, I simply asked him if he wanted a retainer and he said that wasn't necessary but if I wanted to leave a retainer it was all right with him and I said I would feel better if I did and he said all right. He said how about $200 and I said that's all right and I wrote him a check.

Q Was there any further discussion at all about his fee until after the return had been prepared?

A No. The only discussion then we had was on June 19 in my office in Las Vegas.

Q What was that discussion?

A He handed me the statement and told me that he was proud of the job that they did and he appreciated my business very much and he hoped I would keep him in mind when I went to sell my property. I had told him that I intended to sell a piece of property and he was also in the real estate business.

While he's telling me this I have the statement and I'm looking at it.

Q What was your reaction to the statement?

A The first reaction was that it was too high. But then I reflected for a minute because about the huge amount of records that I took to him. He asked me to bring down the '73 return up through the year '79 which I did. I know I spent many hours putting together the information that he wanted on the sale of my property and I just quickly figured the time that I had put in to getting these documents ready and everything ready for him, and if he made any kind of analysis of all the returns that I brought him that he had a lot of time in it and I concluded quickly that the bill was not exorbitant and paid him the $1800 he had coming.

Q Judge, do you have your 1980 return there at the witness stand? I think that's Government's exhibit 5.

A I don't have 5.

Q I'm going to hand you Government's exhibit 5 which is your 1980 return and direct your attention to the second page of the return, that is the back of the front page and specifically --

well, first of all to the amount that's shown here an amount to be refunded, what is that amount?

A $20,927.

MR. JOHNSTON: I hope I'm not out of order in standing by the witness, your Honor. I have to show him these things, really.

THE COURT: Well, I don't think Judge Claiborne needs a guardian to show him these things.

MR. JOHNSTON: I'm not here to protect him, Judge, I'm pointing him to the right thing.

BY MR. JOHNSTON:

Q Directing your attention to line 55, what is entered on that line?

A $17,848.

Q How is that identified on the line?

A As a total federal income tax withholding.

Q What's the next line?

A 1980 estimated tax payments of 4,182.

Q Would you read the full printed line on 56, Judge?

A 1980 estimated tax payments and amount applied from 1979 return, $4,182.

Q Would you look at your '79 return now if we can fine it? Exhibit 3, Government's exhibit 3, turn it around this way, Judge. What is the final figure and how is that identified on the second page of that return?

A The amount of line 63 to be --

Q Here.

A 63?

Q Yes, sir.

A $4,182.41.

Q How is that identified with the printing on that line if you can tell us?

A That is identified as the amount overpaid.

Q For 1979?

A For 1979.

Q Do you understand, Judge Claiborne, that on the 1980 return which Jerry Watson prepared that you were given credit for those two amounts, the 17,000 plus the 4,000?

A Yes.

Q Had you in addition made some other payments to accounts of your 1980 return?

A Yes. The 20,000 plus amount that I sent in with the request for an extention.

Q And had you made an additional payment on account of the estimated tax?

A Yes.

Q How much was that?

A I don't know.

Q Sir, if we can find the right exhibit I'll show you -- may I have Government's exhibit 30, please?

THE COURT: Haven't we been over this, Mr. Johnston?

MR. JOHNSTON: I don't thinkso , your Honor, not as it appears on this line of questioning. We've haven't been over this.

THE COURT: Why, then, are we repeating it?

MR. JOHNSTON: Well, I thought perhaps Judge Claiborne would remember this.

BY MR. JOHNSTON:

Q Does this refresh your recollection as to the amount you paid already on the estimated?

A Yes, $2500 on April the 11th of 1980.

Q Does the 1980 return which Jerry Watson reported give you credit for either the 2500 or the 2,000?

A No.

Q What's the amount of the refund that's indicated owing to you on the 1980 return, Judge, do you have that still? That would be Government's 5. Look on the second page, at least, the bottom. You'll have to turn it over.

A $20,927.

Q When you signed the return, Judge Claiborne, were you aware that Mr. Watson's office had not given you credit for the $20,000 payment or the 2500 payment?

A No.

Q When did you first discover that?

A When I received the refund check in July.

Q And what was the approximate amount of the refund checks?

A 44,000.

Q Were you surprised when you received that?

A Yes.

Q Did you do anything as a result of receiving that?

A Yes, I did. I went back and I checked, I immediately checked my return.

Q Did you ask Mr. Watson about it?

A And then I called Mr. Watson and made an appointment with him and went to his office. I showed him the check.

Q Did he then explain to you why the refund was more than twice the amount indicated on the return?

A No. He had no immediate answer for it. He said, "I'll to have" --

MR. HENDRICKS: I'm going to object to the hearsay from Mr. Watson. This has not been covered in Mr. Watson's testimony.

THE COURT: I don't think Mr. Watson has been interrogated as to this, has he?

MR. JOHNSTON: I'm not sure, your Honor.

THE COURT: I'll sustain the objection.

BY MR. JOHNSTON:

Q Mr. Hendricks has asked you questions, Judge, as to why you would keep money in a vault where it didn't earn any interest. Was there an occasion when you took money from the bank and put it into a form where it would not earn interest?

A Yes.

Q When was that?

A In 1975.

Q What did you do?

A I took $50,000, I withdrew $50,000 out of my account and bought a cashier's check for that amount made payable to myself and put it in the drawer of my desk.

Q Did that earn any interest?

A No, it didn't.

THE COURT: For about a year and a half?

THE WITNESS: For a year and a half.

THE COURT: We're going over this again, Mr. Johnson.

MR. JOHNSTON: These were matters that were covered under cross-examination, your Honor.

THE COURT: I have no objection to him asking him a question, but we're going over all the facts again and I recall Judge Claiborne's testimony on it. But go ahead.

MR. JOHNSTON: I appreciate your Honor's comment. I have not very much more, your Honor, in any case.

BY MR. JOHNSTON:

Q Judge Claiborne, was it necessary for you to deposit the full amount of $75,000 into your bank account on August 31, 1978 in order to cover the checks to the Internal Revenue Service for your '77 tax liability?

A No.

Q Did you have a balance in that account already?

A Yes, approximately 50,000, I think.

Q Finally a question with regard to Government's exhibit 39 which is the 1978 financial disclosure report. I'm not sure where that is. May I see that, Judge, if you have have it there, 39?

A Here it is.

Q May I see it, please? All right. Judge Claiborne, this Government's exhibit 39 is the 1978 financial disclosure report, right?

A That's correct.

Q Does that report correctly reflect that you had no obligation for any $75,000 loan in 1978?

A That is correct. This statement reflects I had no liabilities whatsoever and I did not have.

MR. JOHNSTON: May I have just a moment, your Honor? No further questions.

THE COURT: I take it, Judge, that you're only required to file as to liabilities in excess of $10,000?

THE WITNESS: That's correct.

THE COURT: You're not talking about your gas or electric bills?

THE WITNESS: Oh, no.

THE COURT: They run along until everybody dies.

THE WITNESS: That's for sure.

THE COURT: All right Mr. Hendricks, any recross?

RECROSS-EXAMINATION

BY MR. HENDRICKS:

Q Judge Claiborne, you testified that you didn't intend when you took the bench for Jay Wright to continue keeping your records; is that right?

A I did not say that, Mr. Hendricks. I said that when I talked to him I said, "Go ahead and finish up this year and go on doing just exactly what you're doing and next year I will not need you. I said the only thing I will need next year is a tax preparer". That's the way I put it. I didn't mean I wasn't going to use him any more.

Q And you finished up the year 1978?

A I finished it up, he finished '78.

Q And you continued to send him bank deposits for the year 1979 up until early 1980, didn't you?

A No, I didn't.

Q Wasn't that your testimony on redirect?

A No, that was not my testimony.

Q That you sent him bank records until early 1980?

A No. I said that he quit getting my bank statements in January or February.

Q Of what year?

A Of '79.

THE COURT: '79, Judge?

THE WITNESS: Yes.

THE COURT: I was the one that asked the question previously and you indicated it was January or February of 1980. You mean 1979.

THE WITNESS: (Witness nods head affirmatively.)

BY MR. HENDRICKS:

Q Did you ever tell Jay Wright that you didn't want to use him any more for bookkeeping?

A Specifically as saying that, "You're through, I'm not going to use you any more", no.

Q That you wanted to significantly change the way in which your relationship was?

A No, I did not.

Q Why didn't you tell him? Why didn't you say, "Jay, I'm taking the bench now, I want to change"?

A I think he was aware, certainly everybody was aware of that because I had no contact with him on any tax matters at all after he did my '79 return. I don't think that I talked to him about a single thing and he didn't do a single thing for me during the entire year until tax time in 1980.

Q He prepared, in fact, your 1979 return, didn't he, in early '79?

A Yes, he prepared that and '76 and '77 also.

Q And your 1979 early in 1980?

A Yes, he prepared the '79 return.

Q Now you testified on redirect about your book, Defense exhibit 47. Did you ever give that book to Mr. Wright or make any photocopies of any of the pages?

A No.

Q You never showed that book to him at all?

A No.

Q Did you ever give the book or show the book or make any photocopies of the entries of that book to Mr. Watson?

A No. I had no reason to. I gave him the figures from it.

Q Now you testified on redirect that you were by no means an expert as a result of the number of tax trials that you sat as presiding Judge, that you were by no means an expert in the area of taxation. Wouldn't you agree with me that you were very familiar with tax law and questions relating to that area?

A The tax law?

Q Yes, sir.

A Generally. No, I would not say I am. I'd say that as a general tax question that arises that I'm congnizant of it and I can comprehend it and I can handle it with a certain degree of professionalism, but in all of the general tax laws I wouldn't say that.

Q Do you recall being asked about this matter on April 2nd, 1984 at page 8338?

MR. JOHNSTON: 8338?

THE COURT: That's only 5,000 difference.

MR. HENDRICKS: 3278, I'm sorry.

BY MR. HENDRICKS:

Q Do you recall the question,

"Q. Wouldn't it be fair to say that by 1980 you were very familiar with tax law?

A. That I was what?

Q. Very familiar with tax law and questions involving tax?

A. Yes, I would say that I would be able to comprehend most of the ordinary tax problems."

THE WITNESS: That's what I just now said.

MR. RAGGIO: Counsel, excuse me, we don't find that on 3278.

MR. HENDRICKS: 3238.

BY MR. HENDRICKS:

Q Judge Claiborne, let me show you if I could Government's exhibit 28 and Defense exhibit 1. You testified on redirect examination that you knew of no place except your letter of April 11th, 1980 where Mr. Wright could have gotten this $11,000 plane cost; is that right?

A That's correct.

Q Do you see anyplace in your letter of April 11th where this TCD for $10,000, interest 622.17, can be found?

A No.

Q Do you see anyplace in your letter of April 11tn where the $761.16 figure here is identified as interest?

A In my letter?

Q Yes, sir.

A No.

Q Do you see anyplace in your letter of April 11th, 1980, where the $7,000 figure identified on Government's exhibit 28-A is identified as a fee?

A No.

Q Do you see anyplace in your letter of April 11th, 1983 where the $655.23 figure is identified as interest?

A No.

Q And it's true, is it not, Judge Claiborne, that the plane cost figure and all of these other figures came not from your letter of April 11th but from a conversation with Jay Wright just as Jay Wright has testified?

A That is not so.

Q Now, Judge Claiborne, you testified on direct examination, did you not, that the person you spoke with when you signed the 1980 return in June of 1981 was somebody named Peggy; is that right? Wasn't that your testimony yesterday?

A Yes.

Q Wasn't your testimony on cross-examination this morning before the lunch break that that person by the name of Peggy Kotecki, that was the Peggy you were referring to?

A I said I remember her name was Peggy and you told me that was her last name.

Q Now on redirect you didn't remember and her name may have been Peggy?

A That's my testimony now for the simple reason -- do you want me to explain?

Q No. Let me ask you the next question.

A Oh, all right, you don't want me to.

Q Isn't it true that you subpoenaed Peggy Kotecki?

A No.

Q Did you learn that Peggy Kotecki wasn't even employed by Mr. Watson at the time you say she was employed by him?

A No.

Q Isn't it true that you learned that fact and changed your testimony because you learned that Peggy Kotecki wasn't even employed by Mr. Watson at the time you said you met with her?

A No.

MR. HENDRICKS: That's all I have.

FURTHER REDIRECT EXAMINATION

BY MR. JOHNSTON:

Q Judge Claiborne, did you ever tell Jay Wright orally that that airplane cost $11,000?

A No.

MR. JOHNSTON: Thank you, that's all.

THE COURT: Are we finished with Judge Claiborne, gentlemen?

MR. HENDRICKS: Yes, your Honor.

THE COURT: All right. Thank you, Judge. Next witness?

MR. RAGGIO: Your Honor, I think Miss Quintana has been sworn previously.

THE COURT: Yes, Miss Miss Quintana has been previously sworn and she's remains under oath.

ANNETTE QUINTANA, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. RAGGIO:

Q Miss Quintana, you appeared as a witness for the prosecutor earlier and you indicated you had been associated with Mr. Claiborne when he was an attorney as an associate; is that correct?

A That's correct.

Q How would you describe then attorney Claiborne insofar as his work habits as an attorney?

A He was an extremely hard worker. When he was in trial he worked virtually day and night and occasionally he would call on me to assist in some aspect of trial preparation but usually he was the person with the books himself. I was not there not because he wasn't capable of handling all the research work, he was eminently capable, but there was quite a bit of research work and I assisted in that regard but he worked extremely long hours when needed.

Q Would you say he worked regular hours?

A Oh, yes.

Q Daily?

A It was sometimes necessary in the latter years of his practice that he attend trials away from Nevada but apart from that I think he would average one vacation a year and that would be it and he would be there at the office regularly.

Q During the years in which you were associated with him as an attorney, did you know him to represent indigents or persons who could not pay legal fees?

A Oh, yes, many, many times. That was a big part of his attitude toward life and law. He had been a police detective at one time. He had also been in the military service. He had a family and he very well knew the exigencies of people who worked on salary and had to spend all of it to maintain a reasonable standard of living.

For example, he served I think with never a fee for anyone in the Clark County Sheriff's Department who needed any kind of legal services. I think he also performed legal services without fee for people who were in the Federal Bureau of Investigation. I'm sure that he represented Mr. Tom Parker and I believe that probably was without fee. He also served the community. I think that anytime he was called upon to make a speech he gave himself most generously and this was true year after year and he received awards and plaques from every service agency in Clark County.

THE COURT: Well, lawyers frequently make speeches, don't they, because that's a means of publicity?

THE WITNESS: There was a personal order. For example, he made appearances to the Bar Association a year and a half or two years before he went on the bench and Judge Christiansen of the District Court bench in Clark County, Nevada, spoke to me in chambers one date when he happened to be there. He said, "Im desparate to have a copy of that speech".

MR. HENDRICKS: Your Honor, I'm going to --

THE COURT: Let's cut out the hearsay. You know what's hearsay and I do too.

MR. RAGGIO: Thank you, your Honor.

BY MR. RAGGIO:

Q Miss Quintana, did you know Jay Wright?

A Yes.

Q As a matter of fact, did Jay Wright also act as your accountant?

A Yes, he did

Q For what number of years?

A Many, many years. I'm not sure when this commenced. 1966, 1967, but for many years he did that work.

Q And as an attorney you were also required to file personal income tax returns, I assume, were you not?

A Well, I didn't file a business return. I filed a personal income tax return.

Q I meant a personal return.

A Yes.

Q Did Mr. Wright advise you in the preparation of any of your individual income tax returns?

A All of them for a period of many years.

Q Did that continue through 1970's?

MR. HENDRICKS: Your Honor I'm going to object to this line of question. Mrs. Quintana's tax returns have nothing to do with this case.

MR. RAGGIO: I assure the Court it will be tied in. I assure the Court.

THE COURT: I want to know why it can be tied up. We're certainly not going to tie Miss Quintana in.

MR. RAGGIO: I'm going to ask her about her 1979 tax return, your Honor.

THE COURT: Hers?

MR. HENDRICKS: If counsel is going to make a proffer to the Court I prefer it be made outside the presence of the jury.

THE COURT: Ladies and gentlemen of the jury, take your midafternoon break at this time.

(The following proceedings were had in the absence of the jury.)

THE COURT: All right. In the absence of jury you may proceed.

MR. RAGGIO: Very well, your Honor, I'll be happy to.

BY MR. RAGGIO:

Q Miss Quintana, during the years Mr. Wright prepared your tax returns, did you furnish him information in the form of work sheets and other documents?

A Not work sheets. I maintained a folder into which I would put anything that I thought was income and when it came time to make my return I would make an appointment with Mr. Wright. I would take the folder out to him and set at his desk while we went over each item individually. He then totaled these items on an adding machine on his desk and made notations on tentative forms in pencil that he would later use, I assume, in preparing my tax return. This was done every year.

Q Did there come a time when you went to sign your return or get your final return?

A This happened in two ways over the years. Sometimes I would receive a call, the return was ready for me to pick up and I would go to his office. I think a time or two he might have brought the return to my office in the later years.

Q On any of those occasions when the final return was prepared and you signed the return did you do so in his presence?

A No, I don't believe so. I could have done it a time or two but ordinarily he simply left the return with me, a copy, and I signed the return and mailed it myself.

Q On those occasions would Mr. Wright review your returns with you?

A No, he didn't.

Q On those occasions when you went to get your final return, what disposition, if any, was made of the materials or the information which you had furnished to Mr. Wright?

A Often there were two types of material. One type consisted of rather routine sort of things to be enclosed, like small royalty, minimal interest. I might receive a check for $3.29 for one year, for example. And there would be several of those which he would simply note and also return to me.

There were two other transactions which are a little more complicated, I assume, from the tax reporting procedure and in those transactions he sometimes kept documents or made copies of documents which he preserved relating to small interest and real estate that I had inherited from my parents and there may have been some other items he preserved copies of but they were limited so that when the time came to bring me my return or for me to go get it, there was no return of documents at that time.

Q Did he ever return documents to you?

A He returned documents to me at the time that I first gave them. For the most part when I would have my conference with him and leave the office I usually left with most of the documents that I had brought there.

Q Now directing your attention to the calendar year 1979, for that year did Mr. Wright prepare your individual return?

A He did.

Q And in connection with that return did you have occasion to relate to him information prior to the preparation of your return concerning a fee that was received from one Jay Sarnow in the amount of $10,000?

A Yes, I did.

Q Did you relate to Mr. Wright -- when was that conversation with Mr. Wright? It would have been in '80 sometime?

A Yes, it probably would have been in February -- no, I think it probably would have been in March prior to an April filing. I'm not certain about this but I think that my filling would have been an original period of time allowed by law without an extension.

Q Now on the $10,000 fee that you referred to Mr. Sarnow, what information did you furnish to Mr. Jay Wright at that time?

A I displayed to him the copies of the receipts for the cashier's check that went to Judge Claiborne and disclosed to him the amount of those checks that I retained and essentially displayed the same material and perhaps even the letters that were sent to Judge Claiborne so that Mr. Wright would understand why my responsibility for that fee was only 50 percent.

Q Did you indicate to Mr. Wright that one half of those fees or a total of $5,000, five $1,000 checks went to Mr. Claiborne?

A Yes, I did.

Q Or Judge Claiborne?

A Yes.

Q And your best recollection is that in addition you have showed him the copies of the cashier's checks to Judge Claiborne and the letters of transmittal?

A Yes. And I also know at that time that he was preparing Judge Claiborne's return.

Q How do you know that?

A Because I also disclosed to him -- I may be wrong about this. I remember distinctly going over with him the matter of the typewriter and other physical assets I took from the office and he was the one, Mr. Wright, who set the amount of value of those items and as he referred to it he said, I would have to make a complimentary or parallel statement in Judge Claiborne's return.

MR. RAGGIO: Your Honor, that's the extent of the proffer and I submit to the Court that it's quite relevant.

THE COURT: I take it when you disclosed to him the

Sarnow payment that went half to you and Judge Claiborne, that he was reviewing with you your return?

THE WITNESS: That is correct.

MR. RAGGIO: But indicating if the Court understands the $5,000 total payment that went to Judge Claiborne and explaining to him that 5,000 of that fee would go to Judge Claiborne and told him at that time, in March of 19 -- correction, March of 1980 --

THE COURT: Any comment from the government?

MR. HENDRICKS: Well, your Honor, this has nothing to do with what Judge Claiborne told Mr. Wright or Judge Claiborne's intent directly. What this really is --

THE COURT: Their contention is, the defense's contention is that irrespective of what Judge Claiborne told him or what he didn't tell him and he has contended that he has fully disclosed to Mr. Wright these unreported items. Now I don't see where it's relevant to this situation, the Sarnow situation.

MR. RAGGIO: Excuse me, your Honor. Our contention --

THE COURT: You can't expect an accountant when he's reviewing taxpayer A to remember what might have been said about taxpayer B.

MR. HENDRICKS: That's correct, and if I might also add, your Honor, what this really is is a 404B attempt to demonstrate a character trait on Mr. Wright's part through the use of specific acts. Now if they put this evidence on we're going to be in the position to bring in every taxpayer he's ever served and saying how meticulously he's maintained the record and what he didn't do.

THE COURT: Why isn't this is 404B situation?

MR. RAGGIO: Because, your Honor, Mr. Wright has indicated in his testimony that he has no recollection of receiving information of these payments to Judge Claiborne from Mr. Sarnow. This is direct evidence which indicates --

THE COURT: I don't remember the specific question about that.

MR. RAGGIO: Well, your Honor, he's indicated I think quite completely that he never received from Mr. Claiborne the information concerning the four checks that were paid from Mr. Sarnow through Miss Quintana to Judge Claiborne. That is basic in his testimony.

THE COURT: He certainly testified that Judge Claiborne did not reveal to him the cashier's checks in question.

MR. RAGGIO: That's true, but he's also indicated that he had no information concerning that income from anyone to my knowledge.

THE COURT: Well, I can't remember the specific wording of each particular question and this testimony came up about a week ago, I guess, and I cannot recall that specifically whether or not he was asked did Miss Quintana ever talk to you about that.

MR. RAGGIO: No, he was not asked about Miss Quintana, quite correct, your Honor, but --

THE COURT: I sustain the objection. What do you contend then other than the Sarnow matter is appropriate to bring out by Miss Quintana?

MR. RAGGIO: We contend that the initial part of her testimony that goes to Mr. Wright's habits insofar as reviewing returns with clients and the fact that he returned documents and did not retain them in his possession is relevant for the same reason that he did not do so we contend with Judge Claiborne.

THE COURT: I don't remember him saying specifically as to return of documents. There's never been any contention that he permanently kept the books that were, in fact, kept by him. I guess they were returned to the office. There's never been any contention that they were not returned to the secretary in Judge Claiborne's law office, then Mr. Claiborne's law office.

MR. RAGGIO: May it please your Honor, there's been a contention made about the April 11th, 1980 letter not being in his files and that they couldn't find it. The government has been harping about that. I think that goes to that issue as to whether or not Mr. Wright did, in fact, retain as a matter of course records that were presented to him by clients. This is an example of a case where he did not.

THE COURT: Mr. Wright was on the witness stand. If he wasn't asked the question -- Mrs. Wright certainly said that she maintained the record, did she not?

MR. RAGGIO: I don't believe so, your Honor.

MR. HENDRICKS: Your Honor, she did. Excuse me, she said she maintained correspondence, she also maintained correspondence, she retained their works papers. She did not testify that they always retained all of the documents given to them by the taxpayer, that's not the question. The question is regarding what they retained as correspondence. Defense exhibit number 1 is correspondence. It has nothing to do with a taxpayer's own records.

MR. RAGGIO: I do not recall Mrs. Wright's testimony but my recollection was that she retained records. I would not argue the point, but I do say that it's important, relevant to show that as a matter of course they did not.

THE COURT: I will sustain the objection. I cannot possibly remember every word that Mr. Wright testified to. I have urged you gentlemen on both sides to have a daily transcript. For reasons that were obvious, namely the expense, that was not arranged for.

MR. RAGGIO: Your Honor, will you allow me to state for the record that the reason that we feel the Sarnow portion of his testimony is relevant is because it shows that at that time in March of 1980 from whatever source Mr. Wright had an independent, had independently received information concerning the fact that Judge Claiborne had received a total of $5,000 in fee income through Miss Quintana? That's the purpose and we offer that for that purpose.

THE COURT: All right. My ruling is the same. I take it there's no need for Miss Quintana to remain any longer, gentlemen?

MR. RAGGIO: We have no reason, your Honor. She can be excused.

THE COURT: And I take it the government does not wish her to remain?

MR. SHAW: She's still under our subpoena, I believe, your Honor.

THE COURT: She's under your subpoena?

MR. SHAW: Yes. That's what she's doing in the courtroom, today.

MR. JOHNSTON: I object to that statement. She may be under their subpoena but she certainly is not their witness.

THE COURT: I take it she's not to be excused, then?

MR. SHAW: That's correct.

THE COURT: Thank you, Miss Quintana. You may stand down.

We will take a ten minute recess.

(A short recess was taken.)

THE COURT: May I add to the prior ruling I made with respect to Miss Quintana, I am of the opinion that when a Defendant relies upon full disclosure of the facts to his tax preparer, that that's the obligation of the Defendant and no outside information would be pertinent. Call the jury.

All jurors are present. Who is our next witness?

MR. JOHNSTON: Defense would call Mr. Gologorski.

THE COURT: I suspect, Mr. Gologorski, while I now how to spell your name, perhaps you better spell it again.

THE WITNESS: G-o-l-o-g-o-r-s-k-y.

MR. JOHNSTON: The main thing to remember is it's full of O's, your Honor.

FRED GOLOGORSKI, DEFENDANT'S WITNESS, SWORN

DIRECT EXAMINATION

BY MR. JOHNSTON:

Q Where do you now reside?

A Berkeley, California.

Q What is your occupation?

A I'm a CPA.

Q How long have you been a certified public accountant?

A Well, in practice six years. I've had my certificate since 1956, I believe.

Q Is the certificate issued by the State of California?

A Yes, it is.

Q Will you tell us what your formal educate has been?

A I'm a graduate of the University of California at Berkeley and I have a Master's degree in taxation from the Golden Gate University in San Francisco.

Q How long have you been engaged in public accounting as a private practitioner?

A Approximately six years.

Q What was your business or occupation before that time?

A I was employed by the Internal Revenue Service.

Q Would you just review for us briefly your career and the positions that you held with the Internal Revenue Service? When did you start with the service?

A I started in 1949 as a deputy collector and became a revenue agent approximately a year later.

Q Where was that?

A In Oakland, California.

Q Did you serve then as an Internal Revenue agent for a period of time?

A I was in the field for approximately five years and then became a manager of field agents.

Q What kind of duties does a manager of field agents have?

A At that time they had about 17 to 28 in central field management. The first type of operation I was excise tax agent for approximately two years and after that revenue agent for about five years.

Q Have you instructed other Internal Revenue Service personnel in the course of your career with the service?

A Yes, I was an instructor in tax law, in fact, IRS.

Q What was your final position with the Internal Revenue Service?

A The final position before I retired was a large case audit manager in San Francisco.

Q What does the large case audit manager do?

A They are responsible for approximately seven to eight very large corporate enterprises and the IRS has on site agents at these large corporate enterprises and they conduct continual examinations of those returns year after year.

Q Is it that kind of work that you were supervising?

A That's correct.

Q Have you also served as instructor in accounting outside of the Internal Revenue Service?

A Yes, I taught accounting at the University of California extension for about six or seven years.

Q Are you a member of any professional organizations?

A Yes. I am a member of the American Institute of CPA's, California Society of CPA's.

MR. JOHNSTON: We would like to submit, your Honor, that Mr. Gologorski is qualified as an expert witness.

THE COURT: Any questions under Voir Dire, gentlemen?

MR. HENDRICKS: No, your Honor.

THE COURT: All right. He may testify as an expert.

BY MR. JOHNSTON:

Q Mr. Gologorski, have you prepared certain schedules for our use in this trial?

A Yes, I've prepared two schedules, one for the year 1979 and one for the year 1980.

Q I'll show you this document and ask you if this is a copy of the 1979 schedule?

A Yes, it is.

MR. JOHNSTON: A copy has already been provided to government counsel, your Honor, and we'd like to offer this in evidence and interrogate Mr. Gologorski about it?

THE COURT: What's the next Defendant's exhibit number?

THE CLERK: Number 5, your Honor.

THE COURT: It will be admitted, Defense exhibit number 5.

(Defendant's Exhibit 5 was marked for identification and admitted into evidence.)

MR. JOHNSTON: I provided a copy for the Court and we have copies, your Honor, that we'd like to hand out so the jury may follow the testimony and then we'll pick them up at the conclusion of the testimony.

THE COURT: Members of the jury, the copies of Defendant's exhibit number 5 will be handed to you. They will be collected after we finish the discussion of that but it may aid you some in following Mr. Gologorski's analysis.

BY MR. JOHNSTON:

Q All right, Mr. Gologorski. Directing your attention to the very first part of the first page of your 1979 schedule now, what have you listed under heading A, legal fees received?

A I listed the legal fees received by Judge Claiborne according to the two government exhibits, government exhibits 6 and 9, the schedule of the dates and check numbers and the amounts received and the source of amounts.

Q All right. The checks that you've listed, Mr. Gologorski, are identical to the checks that were listed by the government?

A I certainly hope so. Yes, they are.

Q There's no number on this, that's my problem. On government exhibit 42?

A Yes.

Q They are the same in every way, aren't they?

A Yes.

Q So there's no disagreement between your schedule and the Government's schedule?

A That's correct.

Q What are those checks again?

A They are a series of 9 checks from James Brown to Judge Claiborne in the year 1979.

Q And the second group?

A Are a series of five cashier's checks to Judge Claiborne from Annette Quintana.

Q What have you indicated under heading B?

A B is from Defense exhibit 1 and this is the 4/11/80 letter from Jay Wright -- to Jay Wright from Judge Claiborne. Fees received during 1979 for practice before I became a Judge are $41,073.93.

Q And you simply copied this from their exhibit; is that right?

A That's correct.

Q How does the number set forth in exhibit 1 compare with the total of fees that you've indicated up above?

A Well, it looks like there's a dollar discrepancy.

Q Did the Judge overstate the amount or understate it?

A The Judge understated the amount.

Q Would you compare the numbers again, Mr. Gologorski?

A Well, the one check that's understated is on November 13th, check number --

Q No. But the total in the 4/11/80 is how much?

A $41,073.83.

Q And the correct total is how much?

A Is $41,073.93.

Q So did the Judge understate it?

A He overstated.

Q Would you turn page 2 of your schedule, please? What does page 2 concern, Mr. Gologorski?

A This is from Government's exhibit 29 and it's sort of just a very brief extract from the pertinent passages of three letters that Jay Wright was requested to write to national financial institutions by Judge Claiborne.

Q What was the first letter?

A The first letter is a letter to Stanwell Mortgage from Wright. It's dated March 7, 1980.

Q And you quoted from that letter?

A Yeah, his earnings from the private practice of law for the year 1979 was $45,371.93.

Q To whom was the second letter written?

A The second letter was written on May 22nd to the First National Bank of Nevada.

Q And the third letter?

A To the First Western Savings and Loan Association dated May 22nd, 1980.

Q The second and third letters bear the same date?

A That's correct.

Q Do they also contain exactly the same text?

A Yes, they do.

Q Is the text of the second and third letters the same as that of the first?

A Yes.

Q Thank you. All right, sir. Would you turn now to the third page of your 1979 schedule and tell us what you've set forth there under D?

A In paragraph D we have the legal fees reported on income tax return on Schedule D of the 1040. That came right out of the return on the Schedule C.

Q Under E what do we have?

A Here the legal fees reported to Wright in an undated letter from Judge Claiborne. This is Government's exhibit 28.

Q Let me just get the blow-up of that so the jury will be reminded again what that exhibit is. They've seen it before. Referring back to your schedule now, have you quoted from exhibit 28 on the sheet here, Mr. Gologorski?

A Yes, it's a series of dots. What I indicated here is the tabulation taken from my deposits and authentic --

Q That's the portion of the letter right down here?

A That's correct.

Q Then have you simply -- what are the figures that you've set forth there? Are those taken directly off the exhibit, off the letter?

A That's correct.

Q And you've set them forth exactly as they appear in the undated letter?

A Yes.

Q You have a notation about the total figure of 46,371, Mr. Gologorski. What is that?

A   This is the total of deposits from 4/19 to 11/20/79.

Q   Now the total that you've shown at the foot of the column is the same total that appeared on the undated letter; is that correct?

A   That's correct.

Q   Was there an arithmetic error in that total?

A   Yes, there's $1,000 total.

Q   What's the correct total?

A   The correct total should be 45,371.

Q   Instead of 46,000?

A   That's correct, 93 cents.

Q   Now you've got a second footnote there which you've identified as B. What does that relate to?

A   B refers to the deposit from Government's exhibit 18 in which there was a deposit made on May 23rd, 1979 in the amount of $4,332.87 and to the right of that is a word indicating fees.

Q   Over here?

A   Yes.

Q   What did you determine with respect to that deposit?

A   Pardon me?

Q   Does that report fees?

A   No, it is not fees. They represent two government checks, one I believe for expenses, one for pay checks and one of a refund of what appears to be real estate tax in Las Vegas.

Q Proceeding now to your footnote C, what is that?

A Well, it appears the an analysis made of this figure of 46, just using the exhibit here, $46,371.93 and pertinent items were extracted to arrive at a total of $22,332.87.

Q I perhaps should have asked you at the outset, Mr. Gologorski. Have you been present throughout the entire trial?

A Yes, I have.

Q And have you examined all of the exhibits that have been offered and received into evidence?

A Yes, I have.

Q And have you heard all of the testimony that's been given?

A Yes, I have.

Q Let me ask you, the four items that you've listed under C, are those items that Mr. Wright testified, he identified as fee items out of this list that the Judge put in the letter?

A Yes. The items to the right starting with TCD in the upper right-hand corner of that number, TCD 10,000, interest or INT, 622.17 and everything below that was in Mr. Wright's handwriting.

Q That's this material over here on the right?

A Yes, to the right of the center column. As well as the item on the left, plane cost, $11,000.

Q I want to be sure that that's shown again. That's this entry here?

A That's correct.

of papers and schedules and ask you if you will identify that? Is that a schedule you prepared?

A Yes, it is.

Q Is it a comparable schedule but for the next year?

A Yes, the succeeding year.

MR. JOHNSTON: We will offer this in evidence, your Honor.

THE COURT: It will be admitted as Defendant's exhibit 6 which is apparently for the year 1980.

MR. JOHNSTON: That's correct, your Honor.

(Defendant's Exhibit 6 was marked for identification and admitted into evidence.)

BY MR. JOHNSTON:

Q Mr. Gologorski, proceeding now to Defendant's exhibit 6, what have you set forth under heading A on the first page?

A In paragraph A I indicate legal fees received by Judge Claiborne. These are from the government exhibits 13, 7 and 11. They show the dates and the payor of the checks, the check numbers and the amounts of the checks and respective checks, I should say.

Q Are the items that you've listed precisely the same as those that are shown on this big colored exhibit that the government used?

A Yes, they are.

Q And how many items are there?

A Four items.

Q Do your totals agree with the Government's figure for those four items?

A $87,911.83.

Q So there's no difference between the work that you've done and the items submitted by the Government between the identity and the amount of those four items?

A That's correct.

Q What have you set forth under B?

A B are legal feels reported by Judge Claiborne to Jerry Watson, Defense exhibit 14, income from private practice before appointment in 1978, payable and received in 1980, $88,500.

Q Do you recall whether we had a blow-up of that, Mr. Gologorski? What's the number of the exhibit?

A 41, Defense exhibit 41.

Q I show you this blow-up. Is this a blow-up of the first page of that exhibit, Mr. Gologorski?

A Yes, it is.

Q You were reading just now from the second item on the sheet; is that right?

A Yes, that's correct.

Q Would you read that again?

A It says item two, income from private practice before appointment in 1978, payable and received in 1980 and the amount is $88,500.

Q What is the basis, Mr. Gologorski, for your statement that first of all that amount was reported by Judge to Jerry Watson? Did you hear Judge Claiborne's testimony?

A Judge Claiborne's testimony and the testimony of Jerry Watson.

Q Now what have you set forth under heading C?

A Heading C are past fees from law practice reported by Judge Claiborne in a financial disclosure report, Defense exhibit 2.

Q Are you looking at the same C I'm looking at?

A I'm sorry, I'm looking at D. I thought you asked me if I had D. C is legal fees reported by Judge Claiborne.

Q I'll show you Defendant's 47. Is this the exhibit you're referring to, Mr. Gologorski?

A Yes, that's correct.

Q And have you then in that part of your schedule simply quoted from entries that appear in Defendant's exhibit 47?

A Yes. These should be the exact entries as reflected in paragraph C.

Q And you've set forth the amounts over in the right margin; is that right?

A That's correct.

Q What's the total of those four items as they appeared in Defendant's exhibit 47?

A Well, he doesn't have the total in his book.

Q The total doesn't appear in the book?

A I've totaled them, $87,912.43.

Q Now that appears to be just slightly different from the total at the top of the page which is $87,911.83. Can you account for that difference?

A There's a 60 cent error difference because of the cents on the James Brown check. The one in paragraph A is 19 cents and the one in paragraph C is 79 cents.

Q That accounts for 60 cent difference?

A That's correct.

Q What is the reference in part D of page 1 of the 1980 schedule?

A Part D is the past fees from private practice reported by Judge Claiborne in the financial disclosure report, Defendant's exhibit 2.

Q Let me just find that again so I can show it to the members of the jury. Is this the exhibit, Mr. Gologorski?

A Yes, it is.

Q And the figure 88,500 is the figure that appears up here; is that correct?

A That's correct, on the non-investment income.

Q Do you recall the date of filing of the financial disclosure reports, Mr. Gologorski?

A It's signed by Judge Claiborne on May 16th of 1981.

Q Is there a stamp? Do you remember if there's a stamp date on it?

A I believe there is but I don't have the exhibit in front of me.

Q Let me show you the exhibit itself, Defendant's 2 and see if there's a stamp date when it was entered in?

A Report received May 16th which is apparently the next day.

Q Do you recall the date when the 1980 return was filed? May we have that, please? That's Government's 5, I believe. I'll show you Government's exhibit 5, Mr. Gologorski and ask you if there's a stamp on that exhibit which is the tax return for 1980 showing when it was filed?

A It's stamped in the middle of the first page received OSC looks like 239 or 289, June 16th, 1981, IRS, Ogden, Utah.

Q Is it a fact then that the financial disclosure report bearing the figure 88,500 was filed about a month before tax return was filed?

A Yes. In fact, they were both received exactly a month, May 16th and June 16th.

Q Where does that take it down to? Are we through with the first page?

A Yes, we are.

Q Let's turn then to the second page. What have you set forth on the second page of the schedule?

A In paragraph E I've indicated the errors made in the government's favor in the preparation of the 1980 federal income tax return as filed. It's Government's exhibit 5.

Q Have you developed this information based entirely on the exhibits that are in evidence and the testimony that you've heard?

A That's correct.

Q Would you go through it, please, item by item and compare the errors that are made in the 1980 return in the Government's photograph?

A All right. You want just the errors made?

Q Well, why don't you take us down the schedule and explain the whole schedule to us, Mr. Gologorski, so the members of the jury can understand what this is?

A In the first column of percent per tax return, that's the tax return that was filed, this one here, the tax liability reflects that this return was $1103 even money.

Q Was that incorrect?

A That is incorrect.

Q Was that the correct figure?

A The correct figure is $1,092.

Q Were you able to ascertain the source of the income?

A They apparently looked on the line above it.

Q On the tax schedule?

A On the tax table schedule.

Q Then go down to something entitled tax credits?

A Credits are full dollar offsets against the tax liability.

The first figures are the 1103 and 1092 which is the tax liability of the individual filing this tax return.

Q And that's the final figure on the return?

A Yes. And against that the taxpayer would apply credits, if he's paid money in or money was paid in on his behalf against that tax liability during the years such as estimated tax payment or withholding from income tax from salary which is quite common and these would be credits against these tax liabilities.

Q Will you take it item by item and explain to the jury what you found?

A The first category of tax credit is the withholding of tax on the Judge's value of real estate.

Q The salary he received in 1980; is that right?

A As a Judge $17,848 and they are in brackets to indicate they are an offset against the tax liability.

Q In other words, that reduces the tax liability; is that correct?

A That's correct. There's sort of a glaring disparity because the first credit wipes out the tax liability completely and you have in effect a refund claim back.

Q What was the amount shown on the tax return?

A $17,848 withholding tax.

Q Was that a correct figure?

A Yes.

Q So the number in the next column is identical; is that right?

A That's correct.

Q What's the next item of credit?

A The next item is an overassessment from the preceding year, 1979.

Q Does that mean that he overpaid in 1979?

A Yes, and he had an option to either receive a refund for the year 1979 or have that refund applied against his estimated tax liability for the succeeding year, in this case, 1980 or you can apportion it, any way you choice.

Q So what is the amount that was carried over from the 1979 return?

A $4,182 in both cases.

Q Does that appear as a credit on the 1980 return?

A Yes, it does.

Q Is that a correct figure?

A Yes, it is on line 56.

Q So your number opposite that in the right-hand column is identical; is that correct?

A That's correct.

Q What's the next item?

A Next item is 1980 estimated tax paid. In this case on the original tax return as filed nothing was claimed, that -0- means zero or nothing.

Q He took no credit for that on the return?

A No credit was claimed.

Q What was he entitled to claim?

A He was entitled to claim the amount indicated under the column as credit, $25.

Q What's the final item in that grouping?

A The final item is the payment that went with an application for an extension of time to file the 1980 federal income tax return.

Q What was the amount of that payment?

A The payment was $20,817.59 which I rounded out to 818.

Q Just parenthetically is the rounding to the nearest dollar permitted by the IRS?

A Yes. In fact, it's in the instructions booklet.

Q Was that payment claimed as a credit on the 1980 return?

A No, it was not.

Q But the credit amount is shown in the right-hand column?

A That's correct.

Q So we've got these number in parallel columns now. What do the totals at the bottom indicate?

A Well, the total credits on the claim, $22,030 even which resulted in the next figure below it of a 1980 income tax refund of $20,927 even.

Q Is that the amount of the refund that's shown on the return itself?

A Yes, it's shown on line 64.

Q What do the numbers at the bottom of the column, the right-hand column indicate?

A The total credits come to $45,348 even and the income tax refund for 1980, $44,256.

Q Are you saying, then, that if all the credits were properly shown on the return itself the return would have shown a refund of $44,256?

A That's correct.

Q Is that the amount of the refund that was actually made?

A Yes, it was.

Q What does your final figure indicate Mr. Gologorski?

A The net error made in favor of the government when the return was filed totals $23,329.

Q Are you saying then that the return indicates a refund which is 23,000 and some dollars less than the present fund that would have been shown had all the credits been taken?

A That's correct.

Q Will you turn to page 3 of the 1980 schedule, please? What have you set forth there?

A This is just a summary of the legal fees reported which is the amount included in Schedule D, form 1040 per year per Watson's testimony, $88,500. The correct legal fees reportable are $87,911.83, both on those two figures there for an overstatement of legal feels reported of $588.17.

Q Does the amount of $67,000 for correct legal fees come from the first page of this group of papers?

A Yes, it does.

Q And in showing that the $88,500 was reported, upon what evidence are you relying?

A The testimony of Jerry Watson and the Schedule D, form 1040 for 1980.

Q Now, Mr. Gologorski, at my request and suggestion, have you attempted to put together a kind of chronology of the events that led up to the figure of a 1979 return?

A Yes, I have.

Q Is that based entirely on evidence that's been received in this trial either in the form of exhibits or testimony of witnesses?

A Yes, it has.

Q What's the first date in your chronology?

MR. HENDRICKS: I'm going to object to this chronology.

THE COURT: It's not being introduced into evidence.

MR. HENDRICKS: He's testifying to the chronology.

THE COURT: He may give a chronology as he recalls but there's no exhibit being introduced into evidence, is there?

MR. JOHNSTON: No, your Honor.

BY MR. JOHNSTON:

Q What's the first date in your chronology?

A If first item I have is March 1st and/or thereabouts. I would say March 1st or 2nd.

Q Of what year?

A Of 1980.

Q What happened on that day?

A There's in Government's exhibit 28, it's a letter from Judge Claiborne to Mr. Wright asking Mr. Wright to write three letters to financial institutions.

Q Now that letter is undated, is it not?

A That's correct, undated letter.

Q Upon what do you rely to give you a date of about March 1st, 1980?

A Well, to begin with I replied upon Judge Claiborne's testimony and at the bottom of that exhibit 28 is a date of fees received 1/16/80, so it had to be after 1/16/80 and before 3/7/80.

Q Why did it have to be before 3/7/80?

A Because on 3/7/80 Mr. Wright wrote a letter to Stanwell Mortgage relating the information they have requested due by Judge Claiborne.

Q In that letter did he use a corrected total for the items that are listed in Judge Claiborne's letter?

A Yeah, I believe he used the 45,371 figure.

Q Do you have exhibit number 4 there also?

A I think it's G-28, isn't it -- G-29.

Q Government's exhibit 29. May we just see that briefly? What is the total that Mr. Wright used in the letter to Stanwell Mortgage Company?

A On March 7th, 1980 Mr. Wright wrote to the Stanwell Mortgage Company and the pertinent portion is his earnings, referring to Judge Claiborne, from the private practice of law for the year 1979 was $45,371.93.

Q What's the next significant date in your chronology after March 7 when that letter to Stanwell Mortgage was written?

A The next date is on the 4/11/80 letter to Jay from Claiborne, that's Defense exhibit 1.

Q Do you have more than one item that ties in with the date of April 11, 1980, more than one piece of evidence that relates to that date?

A Yes, I do.

Q What can you tell us about the documents or exhibits that are dated April 11th, 1980?

A Well, in the April 11th, '80 letter he indicated he paid $11,000 for an airplane, it's in the body of that letter.

Q Directing your attention first to the very first sentence in the letter?

A Enclosed check in the amount of $8,000 in W-2 from U.S. Court as requested.

Q Is the $8,000 check in evidence?

A Yes, it is.

Q Have you seen the form W-2 also in that one?

A Yes.

Q Have you examined Government's exhibit 30 which includes an application for an extension of time to file the 1979 return? Are you familiar with that?

A Yes, I am.

Q Is there a $2500 check in that exhibit?

A Yes, in Government's exhibit 30 there is a check for $2500 dated 4/11/80 and this is the first quarterly payment on the estimated tax for 1980.

Q Is there also an indication for an extention of time to file?

A Yes.

Q What day is that?

A It's 4/11/80 and it's requesting for an extention to file until June 15 of 1980.

Q Mr. Gologorski, is it a correct statement, then, that we have a number of documentary exhibits bearing the date 4/11/80?

A Yes.

Q And those include as I understand your testimony the Judge's letter to Mr. Wright, the 4/11/80 letter, the $8,000 check, the $2500 check and the application for an extension of time for filing; is that correct?

A That's correct.

Q What is the next date in your chronology of these events leading up to the filing of the 1980 return?

A Government's exhibit 31. I believe it's undated but it must be around May 1st from Judge Claiborne's testimony where he called right on the phone, told him he had to go to Los Angeles to sit as a Judge --

Q Who called him, Mr. Gologorski, do you recall the testimony on that?

A Judge Claiborne called Mr. Wright.

Q Is that your recollection of the testimony?

A Yes.

Q Do we have an exhibit that relates to that date?

A Yes, G-31.

Q What is that exhibit?

A It's a schedule of, that reflects his gross wages from the courts of $54,409.92.

Q Did you hear the testimony of both Mr. Wright and Judge Claiborne on that?

A Yes.

Q I'll show you Government's exhibit 31-A. Is that a blow-up of the first page of that exhibit?

A Yes, it is.

Q There are other pages, are there not?

A Yes.

Q What is the next date in this chronology?

A   Well, I want to go through -- I see there's an item on G-31 that reflects the private law practice before judgeship $22,332.

Q   Did you hear the testimony on that item?

A   Yes, I did. In addition to that there's a reference to an airplane cost in the bottom part.

Q   What is the cost of the airplane indicated in this exhibit?

A $11,500.

Q   Is that different from the notation that we saw earlier on the original letter from Judge Claiborne to Jay Wright?

A   Yeah, it's different by a $500 amount. The 4/11/80 letter reflects an $11,000 cost for the airplane and I think it's G-28, as I recall.

Q   Is it the $11,000 cost also that appears as Jay Wright's notation on Judge Claiborne's original letter?

A   Yes.

Q   What's your next date, Mr. Gologorski?

A   I'll have to go back.

Q   The last one is May 1st. Where did you go from there?

A   G-3, form 1040 for '79 per Judge Claiborne's testimony was signed on May 2nd of 1980 in blank.

Q   When was the return then received by the Internal Revenue Service?

A   6/17/80.

Q Does that complete your chronology?

A Yes, sir, it does.

Q Now, Mr. Gologorski, in your career with the Internal Revenue Service and in the course of the work that you did for many years as an Internal Revenue agent and as a supervisor, did you have occasion to consider issues that were raised in conjunction with the examination of taxpayers' returns as to whether, for example, a bank deposit evidenced a loan or something else?

A Oh, yes.

Q What evidence have you seen or heard in this trial that indicates the existence of a $75,000 loan to Judge Claiborne in 1978?

A The only evidence I've seen is Mr. Wright's testimony.

Q Have you seen other heard any evidence that identified a lender?

A No. No lender was identified in any way.

Q Have you seen or heard any evidence that indicates repayments being made on such a loan?

A None.

Q Have you seen or heard any evidence that indicated any interest was ever paid on that loan?

A None whatsoever.

Q Was there any interest deduction claimed on a loan in either the 1978 or 1979 return?

A No. There are four months in '79 and 12 months in 1980 and no interest was claimed that would indicate a $75,000 loan.

Q Would you state those years again?

A Four months in '79.

Q In '79?

A Yes, I'm sorry, '78, correction.

Q That's after the bank deposit?

A Yes, the 8/31 back deposit and 12 months in '79 and 12 months in '80.

Q In your opinion as a prior Internal Revenue Service employee and as a certified public accountant does any evidence in this case attach the existence of a $75,000 loan?

MR. HENDRICKS: Objection.

THE COURT: Objection sustained.

MR. JOHNSTON: Does your Honor wish to hear arguments on this?

THE COURT: No. I think the witness could validly give an opinion under the rules of evidence on the ultimate fact but it must depend upon what the underlying facts are.

MR. JOHNSTON: I think that my questioning of him, your Honor, we talked about all the evidence that's available in the trial.

THE COURT: I sustained the objection.

MR. JOHNSTON: Thank you, your Honor. I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. HENDRICKS:

Q Mr. Gologorski, let me start with the $75,000 loan question. You heard Mr. Wright's testimony, did you not?

A Yes.

Q That testimony is consistent with the fact that there was a loan in 1978, what's it not? Just that evidence taken by itself?

A His statement that it was and the notations on the schedule.

Q Well, just the statement. That's consistent with a loan being made in 1978?

A Yeah. If you accept his statement, yes.

Q And you recall his testimony about how that $75,000 item was treated as other items on the schedules?

A Uh-huh.

Q That's consistent, is it not, with a loan being made?

MR. JOHNSTON: Excuse me, your Honor. I'm going to suggest that the question assumes a fact not in evidence, namely that it was treated as other income.

THE COURT: What other income?

MR. JOHNSTON: I don't think it was ever treated as income.

THE COURT: Withdraw the question and try again.

BY MR. HENDRICKS:

Q Do you recall in reviewing the schedules and books maintained by Jay Wright as a result of that tax information and any items of information by Judge Claiborne?

A Yes.

Q And isn't it true that the way in which that $75,000 item was entered originally on the book of Mr. Wright is consistent with Jay Wright's testimony that he was told it was a loan?

A No. In the books themselves the character sales, assets, book there is just a $75,000 deposit and there's a notation to Jay, which I presume is Mr. Wright, referred to as Jay asking what this is. Someone doesn't have a receipt for it but there's no signature of name below that question.

Q There's no indication, is there, that that was a legal fee or he did not know at this time or at any time what that item was?

A That's correct.

Q Have you had occasion to see what's been marked as Government's exhibit 25 and I'll show it to you, 25-A?

A Yes, I've seen this.

Q Mr. Gologorski, who maintained this exhibit, Government's 25-A?

A I maintained it.

Q Who produced it?

THE COURT: In whose handwriting it is?

THE WITNESS: I would say it's Mr. Wright's.

BY MR. HENDRICKS:

Q That's the evidence in the case?

A Yes.

Q Now this phrase right here, "Not income borrowed to pay tax in 1977", is a phrase written down there, that notation, "Borrowed to pay tax". That's consistent with a loan being made, is it not?

A If I take it at its face value, yes.

Q Sure. Did you disregard it?

A Well, I'm considering the concept of a loan in its entirety. This is just one aspect of it.

Q But this notation right here, "Borrowed to pay tax in 1977", that's consistent with a loan, isn't it?

A If you take it just on its face value, yes.

Q How about this notation here "Loan", next to the $75,000?

A That was part of the same picture.

Q Well, isn't that word loan consistent with the fact that a loan took place in 1978 to pay income tax in 1975?

A Yes, sir, if you ignore everything else.

Q Isn't that consistent, that evidence in fact, is consistent with the fact that there was a loan, is it not?

A Yes.

Q Have you seen the tax return for the year 1978? Have you had occasion to see it?

A Yes, I have.

Q The tax return is not inconsistent, is it, with the $75,000 transaction being a loan in 1978, is it?

A That's correct.

Q In other words, it's not treated as income?

A That's correct.

Q Excuse me, '78, if I misspoke. Now let me show you Government's exhibit 42 just for reference purposes. That's the chart for 1979 income. Don't you agree, Mr. Gologorski, that all of the income that is shown on this chart, Government's exhibit 42, as being unreported on the income tax return was, in fact, unreported?

A That's correct.

Q So would it be fair to say that you agree, then, with Mr. Diaz's conclusions as to the exact amount of unreported income for 1979?

A That's correct.

Q So really would it be fair to say that the only difference between your calculation or your opinion and Mr. Diaz's opinion is the question as to whether Mr. Wright ever saw Defense exhibit number 1?

A That's one of the major thrusts of Defense exhibit 1 as well as Judge Claiborne's testimony.

Q Right. Let me show you Defense exhibit 1. What it really comes down to is whether Defense exhibit 1 was ever seen and, of course, Judge Claiborne's testified, fair?

A Yes.

Q Now you for purposes of your calculations for 1979 have assumed, have you not, that Mr. Wright did see Defense exhibit 1?

A Yes.

Q By the way, did you hear Mr. Wright's testimony in that regard?

A Yes.

Q And you heard him say that he never saw it until 1983?

A I'm not sure he quite said that. I have a feeling that he said he cannot remember having received it.

Q Did you hear -- did you disregard that testimony?

A No.

Q Where is Mr. Wright's testimony in that regard reflected in your chart for 1979 either directly or indirectly?

A Well, it's reflected as $41,072.93 on page 1.

Q Now where in Mr. Wright's testifimony does he say that he doesn't have any recollection of ever seeing Defense 1 until 1983? Where is that on your chart?

A That's not reflected on here.

Q It's not reflected? Do you have Government's exhibit 28 there in front of you? Let me show that to you, if I might. I have a blow-up of Government's exhibit 28 right here.

According to your calculations and from what you've observed these figures in Government's exhibit 28, the column in more or less the center bottom of the page and the figures associated with it where provided to Jay Wright by Judge Claiborne?

A   Yes.

Q   And I believe according to your own calculations on the third page bottom of your schedules, you arrived at a figure of the real legal fees which were included in Government's exhibit 28?

A   Yes.

Q   And that figure was $22,332.87; is that correct?

A   That's correct.

Q   It turns out that later that's the same figure that was used on the tax return, was it not?

A   That's right.

Q   Now I believe you testified that you concluded that the only place this plane cost figure, the $11,000 figure could have come from was from Defense exhibit 1; is that right?

A   As far as I know that's the only place it could come from. I see no evidence to the contrary.

Q   But there are lots of other figures here, are there not, in Jay Wright's handwriting that are not in Defense exhibit 1?

A   Yes.

Q   Let's take a look at that, if you don't mind. I have a blow-up of Defense exhibit 1 here. Let's take the first figure, the $10,000 TCD figure. Did that come from Defense exhibit 1?

A No it didn't.

Q And the interest figure of $622.22?

A No.

Q And the next figure, 10,622.17?

A No.

Q And the $10,000 figure in the characterization fee?

A No.

Q And the figure, sale of plane?

A Yes, sir.

Q Your conclusion is it did?

A It says, I'm looking at D-1 here, you have sale of plane $11,000 and here it says, "I also sold my airplane in April and received $11,000".

Q Going down, $761.17, there's notation of interest?

A That's not reflected in D-1.

Q And the $7,000 fee, is that in D-1?

A No. D-1.

Q Is the 605.23 characterization interest, is that in D-1?

A No, it is not.

Q Do you recall Jay Wright's testimony that it wasn't until later in the year when he was preparing Judge Claiborne's return that he put all these notations on the right side of Government's exhibit 28 and the notation plane cost. Do you recall him saying that?

A Yes.

Q Did you take Jay Wright's testimony into consideration?

A I certainly did.

Q Well, his testimony is consistent completely, isn't it, with the fact that this $11,000 figure could only have come from Defense exhibit 1?

A Well, I haven't seen where else it could come from.

Q It's true you agree with me that all the figures on the far right of Government's exhibit 28 with the exception of any mention of plane are nowhere mentioned inside Defense exhibit 1?

A I think Defense exhibit 1 as I understand it doesn't purport to be comprehensive and purport everything that happened in whatever was involved between Jay Wright and Mr. Claiborne. He covered the points he wanted to cover in the 4/11/80 letter and that's what's reflected in there.

Q Do you recall Jay Wright's testimony that the $11,000 figure together with all the rest of these came as a result of the conversations he had with Judge Claiborne?

A Yes.

Q And you've concluded, however, that the only place it could have come from was Defense exhibit 1?

A Yes.

Q Why did you disregard Mr. Wright's testimony?

A I didn't disregard it. I heard it, listened to it and rejected it.

Q You rejected it?

A Yes. I felt this was more significant. Here's something in Judge Claiborne's handwriting with a date and it covers significant points that are accompanied by, mentions the airplane and the $8,000 checks the W-2 form. I think all these tie in.

Q Couldn't this figure have come from a conversation?

A It may have.

Q We know these figures on the right-hand side of 28 didn't come from Defense exhibit 1?

A No, they did not.

Q Doesn't it seem logical to you that at the same time these figures on the right-hand side of Government's exhibit 28 were being discussed that this $11,000 figure was also discussed just as Mr. Wright testified?

A It may have but I haven't heard testimony to that effect.

Q You disregarded it?

A I haven't heard testimony of the airplane.

Q You disregarded Mr. Wrignt's testimony?

MR. JOHNSTON: I'm sorry, your Honor, he answered the question. It's not the answer that counsel is trying to get back from him.

THE COURT: I don't think he said he disregarded it.

He did not reach the same conclusion apparently, Mr. Hendricks, as you did.

MR. JOHNSTON: Could we have his answer, the record read, your Honor? It kind of got lost in the shuffle.

THE COURT: What answer?

MR. JOHNSTON: The witness's last answer.

THE COURT: We can't operate this way, gentlemen.

BY MR. HENDRICKS:

Q Let's pass on to Mrs. Wright. Do you recall Mrs. Wright's testimony that she has no recollection of ever seeing Mr. Wright's 4/11/80 letter that Mr. Goodman showed here of '83?

A If I remember her testimony.

Q And you recall her testimony about how she maintains her tax files and the search she made through her tax file and the fact that she has no recollection of ever having seen it? Did you disregard her testimony?

A No, but I considered it and attached some value less than she asserted based on other witnesses that I heard.

Q Just as a matter of fact?

A No.

Q Is this an accounting process that you went through?

A No.

Q Are you sitting as the jury in this case?

MR. JOHNSTON: Objected to as argumentative, your Honor.

THE COURT: Leave out the last question.

BY MR. HENDRICKS:

Q Where in your schedule, Mr. Gologorski, is Mrs. Wright's testimony reflected either directly or indirectly that she never saw Defense exhibit 1?

A It's not reflected on my schedules or any other schedules. You need an oil job over there.

Q Did you see Government's exhibit 40?

A Yes, I have.

Q What's the date of that?

A The date in the upper right-hand corner is 5/15/80.

Q That is an Ethics in Government filing, is it not?

A Yes, it is.

Q Did you take that into consideration in preparing your schedules?

A Yes, I did.

Q Where is that reflected on your schedules?

A It's not reflected in my schedules.

Q Where is it mentioned in your schedules?

A It's not mentioned in my schedules.

Q What is the amount that Judge Claiborne reports to the Ethics in Government, the Judicial Ethics Committee on that form?

A Reported client fees while in private practice $23,050.76.

Q And that's about half, is it not, of his legal fee income, true legal fee income for 1979?

A Approximately.

Q And that would be consistent, would it not, Mr. Gologorski, with the fact, consistent with the fact that Judge Claiborne never reported his true legal fee income to Jay Wright?

A No, I don't agree with that.

Q It would be inconsistent, would it, Mr. Gologorski, with the fact that Judge Claiborne never reported his true legal fee income to Jay Wright?

A I'm persuaded that the 4/11/80 letter is valid and its contents are valid.

Q Wouldn't you agree you with me for purposes of discussion if we took away Defense exhibit 1, isn't every other document in this case consistent with Jay Wright's testimony?

A Well, Jay Wright's testimony was as I listened to it, I would characterize it as partially evasive and uncertain in many areas.

Q You're not responding to my question. Aren't all of these other documents, including the form that you have right in front of you which you've never mentioned on your schedules, consistent with the fact that Judge Claiborne consistently reported about half to Mr. Wright, to the Judicial Ethics Committee, about half of his true legal fee income for 1979?

A Yes, he did.

Q Were you convinced, sir, that the Government's exhibit 40 in which Judge Claiborne reported his income to the Judicial Ethics Committee to be only about half of what he reported? That was an insignificant document?

A No, I don't think it's insignificant.

Q Would you say it was a significant document?

A It could be characterized as that.

Q Where is it in your schedule?

A It's not in there.

Q Is it your practice to exclude significant financial documents from your schedules?

A No, it is not.

Q So why are you doing it in this case?

A I was advised to leave this out because it would be picked up on cross-examination as it has been.

Q You were advised to exclude Government's exhibit 40?

A The information reflected there.

Q Even though you knew it was a significant financial document?

A No. I think the tax return reflects a figure very close to this figure.

Q The tax return for 1979 under-reports true legal fee income by about a half, doesn't it?

A That's correct.

Q Now let me show you the chart which has been marked for identification as Government's exhibit 43. Don't you agree there was no legal fee income properly reported in 1980?

A You mean the way it should correctly be reported?

Q Properly reported.

A No, it's not correctly reported.

Q So you've had an opportunity to review this chart, Government's exhibit 43?

A Yes.

Q Would it be fair to say that as to the computations that were testified to by Mr. Diaz on this chart that you agree that all of the items that are shown here, $42,000 check from Mr. Echeverria, $888.30 check from Mr. Brown, $37,500 from the Wyman Estate, and finally a $7,000 check from Mr. Brown, none of those checks were properly reported on the 1980 income tax return?

A No, they were not properly reported.

Q That's my question. Was there a Schedule C?

A No, there was not a Schedule C. You're talking about 1980?

Q Yes, 1980.

A There was no Schedule C for the year 1980.

Q Have you had occasion to review Government's exhibit 1, the '77 return?

A Yes.

Q Was there a Schedule C on that return?

A Yes.

Q Have you had occasion to review the Government's exhibit 2, the '78 return?

A Yes.

Q Was there a Schedule C on that return?

A Yes.

Q Have you had occasion to review Government's exhibit 3, the 1979 return?

A Yes.

Q Was there a Schedule C on that?

A Yes, there was.

Q Could you tell the ladies and gentlemen of the jury what a Schedule C is?

A A Schedule C is a separate credit for people who are operating a trade or business and it contains lines and instructions to reflect the figures from that business activity, whatever it may be, gross sales, and the allowable deductions under the tax law against that business's income and a net profit.

Q So if a person were an attorney and he received legal fee income they would be probably reportable on a Schedule C?

A Yes, this is the way it should be done.

Q And you saw evidence in Government's exhibits 1, 2 and 3 that that's exactly the way Judge Claiborne reported his legal feel income in '77, '78, and '79?

A That's correct.

Q   And you heard Judge Claiborne's testimony that, in fact, for 30 years, 30 some years he reported his legal fee income on Schedule C?

A   Yes.

Q   Government's exhibit 5, however the 1980 return contains no Schedule C, does it?

A   No, it does not.

Q   In fact, there is not Schedule C income reported for 1980?

A   That's correct.

Q   Would you agree with me, Mr. Gologorski, that legal fee income is ordinary income for purposes of tax connotations?

A   Yes, if it's for services rendered, legal services. In this case it's ordinary income.

Q   And in that regard legal fee income is just like a salary that a person might received from a business if they are employed by some firm and they worked as a secretary, they received a salary; legal fee income is exactly the same as any other salary income, is it not?

A   Yes.

Q   In the sense that it is ordinary income?

A   Under the tax law it is.

Q   And that's sort of a fundamental tax accounting proposition, is it not?

A   Yes, sir.

Q Would you expect or would you know from your experience whether a person who had been in business for 30 years would know that?

A He certainly should.

Q It's true, isn't it, that legal fee income can never be reported as a capital gain or loss?

A That's correct, if it's for legal services rendered.

Q Yes. Isn't it true, Mr. Gologorski, that accounts receivable can never be reported as capital gains or losses?

A That's correct.

Q Those are -- that's a financial aspect of tax accounting, is it not?

A Yes, accounts receivable and inventory can never be treated as capital gains if that's your question.

Q Right. May I just have a moment, your Honor?

MR. HENDRICKS: That's all I have, your Honor.

THE COURT: Redirect, Mr. Johnston?

REDIRECT EXAMINATION

BY MR. JOHNSTON:

Q Mr. Gologorski, you heard Jerry Wright's testimony, did not?

A Yes, I did.

Q Did you hear him testify that the $88,500 figure that Judge Claiborne gave him was reflected in the Schedule D in that return?

A Yes, I did.

Q Did you also find some internal evidence in the return itself that the fees receivable were taken into account on Schedule D?

A Yes. In the upper left-hand corner of Schedule D is a handwritten -- I don't have it here.

Q The 1980 return, Government's exhibit 5, I don't believe I have it here. The clerk thinks you have it.

A Yes, I do, I beg your pardon.

Q What reference did you find in that schedule itself that would suggest that the fee income was reflected or taken into account?

A Well, in pencil part 1 of Schedule D it's written accounts receivable for law practice upon leaving upon confirmation to Judicial U.S. Court appointment, 1978, and then from this notation there are two lines coming down with an arrow pointed down to lower portion which are certain figures reflected.

Q Does that suggest to you that the $88,500 was taken into account on Schedule D?

A Not from looking at Schedule D but from Jerry Watson's testimony, yes.

Q Let me show you also Defendant's exhibit 41. Those are the yellow sheets that the Judge provided to Mr. Watson with some information for the preparation of the return.

Do you find a notation on that first page which suggests that the 88,500 was somehow taken into account or reflected in the return?

A Well, item 2 says income from private practice before appointment in 1978. Payable and received in 1980. $88,500.

Q There's a kind of footnote, I think it's item 5, do you see that?

A Yes, at the bottom of the page.

Q Would you read that?

A If I can. "What I see in his business transactions is fair market value was not considered on the book sale. He had a gain from" -- I can't get the next word -- "because book value was used as basis. If he has knowledge of their fair market value we can go for it in '80 return and apply it to" -- looks like number 2 income.

Q What's number 2 income on that schedule?

A On, that's the J-5 above.

Q Does that suggest to you that somebody was proposing to use the 88,500 in preparation of the 1980 return?

A It certainly appears that way.

Q I want you to look again at Government's exhibit 40 which is the financial disclosure report for the year 1979. That reports clients fees while in private practice $23,050.76, does it not?

A Yes, it does.

Q Does that exhibit assist you in any way in determining what the correct income was or what information Judge Claiborne may have given to Jay Wright?

A I don't feel it does.

Q Does it really have any bearing at all on either of those issues, the correct amount of or the information that the Judge provided to Jay Wright?

A No.

Q Do you have in mind the 4/11/80 letter again, Mr. Gologorski? There's an issue as you're well aware whether Mr. Wright ever received this letter. You're aware of that issue, I take it?

A Yes.

Q Does the fact that there's an $8,000 check in evidence dated 4/11/80 in your opinion constitute some evidence that the letter was received?

MR. HENDRICKS: Your Honor, could we have a few these questions be put in a nonleading fashion?

MR. JOHNSTON: I submit it's not leading.

THE COURT: I don't think it's leading for an expert witness.

THE WITNESS: I would say the $8,000 check is an indication.

BY MR. JOHNSTON:

Q There is also in evidence a W-2 for 1979?

A Yes.

Q There's reference in the letter to a W-2?

A Yes.

Q Does that also reference to you that the letter was received by Mr. Wright?

A Well, it's an indication that the letter was received by Mr. Wright.

Q The request for an extension of time to file a return is also dated 4/11/80, isn't it?

A Yes, as well as the $2500 check.

Q You heard Mr. Wright testify, did you not?

A Yes, I did.

Q Do you recall his answer to the final question that I put to him when I asked him whether he had any present recollection of any conversation with Judge Claiborne?

A Whether he had any conversation?

Q No, whether he had any present recollection of any particular conversation with Judge Claiborne?

A Yes.

Q Did you hear his answer to that?

A Yes, I think so.

Q Wasn't his answer no?

A That's correct.

Q Now Mr. Hendricks asked you some questions about Government's Exhibit 25 which is this work sheet of Jay Wright's. Do you recall this?

A Yes, I do.

Q And he asked you whether the notations that are up here, not income, borrowed to pay tax for 1977 and the word loan as written out here, whether that's consistent with the idea that the Judge may have had a loan?

A I think just taking that at its face value, unless there was further evidence to support it, it would not be consistent.

Q Are you aware of any other evidence in this trial that indicates the existence of a loan in 1978?

A I haven't heard any witness other Jay Wright indicate evidence to the contrary that there was, in fact, a loan.

Q Now in the preparation of the return, Mr. Gologorski, of any writing, would it be of any particular concern of the preparer whether a bank deposit was a loan or whether it came out of a cash hoard?

MR. HENDRICKS: I would object to, this, your Honor, as irrelevant and it's not covered under any --

MR. JOHNSTON: I think its highly relevant.

THE COURT: I will permit it.

BY MR. JOHNSTON:

Q Would it make any difference in reporting a tax return whether the deposit came from a loan or came from a cash hoard somewhere?

A If it came from either of those it would not be income.

Q Would that be a concern of the tax preparer?

A He's concerned with the item.

THE COURT: I must tell you that the count involving the $75,000 financial disclosure hasn't got a thing to do with the tax return. It makes no difference whether the government lost anything in connection with the $75,000 transaction.

BY MR. JOHNSTON:

Q I want you to refer back, Mr. Gologorski, to your 1979 schedule, if you will. On the third and final page of that schedule, your 1979 disclosure, I direct your attention to the note C toward the bottom of the page where you've listed four items that total 22,332?

A Yes.

Q What are those items?

A There's a $10,000 item so he --

Q I mean what do they represent, where do they come from?

A They come from the information from above. Apparently it was analyzed and certain items were extracted to produce these four items.

Q Do those items represent the items above what Mr. Wright identified as fees?

A Let's see. 10,000 came from the 20,622.17 and the one that's on there listed as fees and the 7,000 listed as fees as well as the 4,332.87.

Q You heard Mr. Wright's testimony, did you not?

A Yes.

Q Did you hear his testimony as to whether the 4,332 item actually represented a fee?

A I don't recall his testimony on that subject.

Q Are you familiar with the exhibit which shows a deposit slip and three checks that composed a deposit in that total amount?

A Yes, I am.

Q Are those income items?

A They are not income items.

Q You heard Mrs. Wright testify that she looked for the 4/11/80 letter and could not find it?

A Correct.

Q Does that persuade you that the letter was never sent?

A No, because I've been in many accounting offices and its volume of record keeping and books and ledgers and folios and clients' records and so forth, I would say it's almost impossible not to misplace if not completely lose correspondence or records.

Q Mr. Hendricks asked you whether there were Schedule C's included in the Judge's tax returns prior to 1980?

A Yes.

Q There were such schedules, were there not?

A Yes, there were.

Q Who prepared those returns?

A His accountants.

Q Well, who are his accountants?

A Mr. Wright.

Q The 1980 return, who prepared that?

A Mr. Watson.

Q Did you hear the Judge's testimony that he didn't really look at the 1980 return when he signed it?

A That's correct.

MR. JOHNSTON: No further questions.

THE COURT: Anything further from the Government?

MR. HENDRICKS: No your Honor.

THE COURT: Thank you, Mr. Gologorski, you may stand down.

MR. GOODMAN: May we have the Court's indulgence for just a moment, your Honor? I'd like to check the exhibit list, please.

THE COURT: The exhibits that were distributed to the jury should now be collected back.

Members of the jury, if any of you took notes I hope that you did not copy the exhibits. If you did, please destroy those notes.

MR. GOODMAN: Your Honor, if it pleases the Court, Judge Claiborne rests his defense in chief.

THE COURT: Do you have a short rebuttal witness that you would like to put on, gentlemen?

MR. HENDRICKS: Your Honor, we do not and we would ask the Court's indulgence and request that we begin tomorrow morning.

THE COURT: All right. I'll excuse the jury at this time until 9:30 tomorrow morning at which time we will hear the Government's rebuttal.

(The proceedings continued in the
absence of the jury.)

THE COURT: Gentlemen, it appears I assume that we are approaching the end of this trial and I would like to make some arrangements. Can you give me an estimate of the approximate time for the Government's rebuttal?

MR. SHAW: I believe, your Honor that we could be completed by 2:30 tomorrow.

THE COURT: About what time?

MR. SHAW: 2:30.

THE COURT: You mean that's allowing for the luncheon recess?

MR. SHAW: Yes, your Honor.

THE COURT: The defense may have some other testimony along that line. Depends upon what comes out in rebuttal testimony. I would assume, then, gentlemen, that we should be prepared for the final arguments on Thursday.

MR. GOODMAN: Excuse me, your Honor, I'm sorry?

THE COURT: I would assume that we should be prepared for final arguments on Thursday and may I have suggest, gentlemen, as to how much time you wish in final arguments? Whatever is agreed upon, of course, will have to be adhered to but last time I think we had two hours for each side and, of course, there was a lot more ground to cover.

MR. GOODMAN: Right, but they would not permit me to be as eloquent as I wanted to be last time but this time if it please the Court we have discussed it very thoroughly and gave it an awful lot of thought and we would appreciate two hours again.

THE COURT: What's your feeling, gentlemen? I thought two hours -- we only had two hours for a 7 count indictment.

MR. SHAW: My memory was that it was an hour and a half for a 7 count indictment. We think and hour and a half is sufficient.

THE COURT: I'd have to look back at the record. If your recollection is one and a half --

MR. SHAW: I'm not suggesting that the Court should be locked into what it was last time. If it was two hours, I'm corrected. Of course it was three times as long as this trial.

MR. GOODMAN: We felt we were rushed last time, your Honor.

THE COURT: Well, I think the an hour and a half, gentlemen, is adequate time to cover this subject and that will enable you to display your eloquence, Mr. Goodman, in fine style. In any event, if we conclude the evidence tomorrow before you leave, I must have my charge conference with you. I have one or two suggested additions in the charge because of the fact that this is the second trial that I want to go over with you and I know you want to argue, Mr. Johnston, the Pompanio situation but I've found some law that's against you, dead against you and I just want to let you know if you've got anything else I'll be glad to look at it.

But your one decision you rely on it is quite true that if there is a conviction it is improper for a Court to let that conviction stand based solely upon the fact that the Defendant taxpayer may have filed a false return.

But the inferences from that are entirely to the contrary. So I mention it to you because I think on your motions that you're going to run with the same ball you ran with at the conclusion of the direct testimony.

My law clerk can give you the citations if you wish to look at them yourself. Several of them go further than I would go by any means on the inferences. I mention that because there's an inference, of course, from the mere filing in the First Circuit that goes much further than that on a case with a prosecution under this identical statute so I mention it to you for what it may be worth.

In any event, I think we'll very clearly be ready to go for the arguments Thursday morning and my present intention is to allow an hour and a half a side and, of course, the Government will have to decide what it wishes to do with its opening and closing and how much time they want. Anything further? If not, court will be in recess until tomorrow morning at 9:30.

(Whereupon the proceedings recessed until
August 8, 1984 at 9:30 a.m.)

INDEX

DEFENSE WITNESSES:	DIRECT	CROSS	REDRT	RECRS	FRD
Harry E. Claiborne (Resumed)	906J	913H 995H	1008J	1033H	1038J
Annette Quintana	1029R				
Fred Gologorski	1052J	1081H	1097J		

EXHIBITS

DEFENSE		IDENT	RECEIVED
47-A	Photographic Blow-up of one page of Defendant's Exhibit 47		911
2-A	Photographic Blow-up of first page of Defendant's Exhibit 2		911
5	1979 Schedule Prepared by Gologorsky	1055	1055
6	1980 Schedule Prepared by Gologorsky	1063	1063

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, MARY E. BELL, Certified Shorthand Reporter Number 98, do hereby certify that I was present on the 7th day of August, 1984, at the hour of 9:30 o'clock a.m. thereof, in the United States District Court, District of Nevada, Reno, Nevada, and reported the proceedings in the within-entitled cause in stenotype notes, which were thereafter transcribed by me;

That the foregoing transcript, consisting of pages 904 through 1110, contains a full, true and complete transcription of my said stenotype notes, and is a full, true and correct record of said proceedings had at said time and place.

DATED at Carson City, Nevada, this [illegible] day of September, 1984.

MARY E. BELL, CSR, RPR, CP
Nevada CSR #98

No. 84-1294

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-appellee

vs.

HARRY E. CLAIBORNE,

Defendant-appellant

ORIGINAL

RECORD IN FORTY-TWO VOLUMES

REPORTER'S TRANSCRIPT
IN FORTY VOLUMES

Appeal from the United States District Court for the

District of NEVADA (RENO)

CR-R-83-57-WEH

VOLUME 37

FILED DECEMBER 13, 1984

PHILLIP B. WINBERRY

Clerk of the United States Court of Appeals

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

[illegible] TO BE A TRUE COPY
[illegible] FITZGERALD Clerk
[illegible] District Court
By
Deputy Clerk

UNITED STATE OF AMERICA,)
)
Plaintiff,)
)
v.)
)
HARRY E. CLAIBORNE,)
)
Defendant.)
. . . .

Case No. CR-R-83-57-WEH

Reno, Nevada
August 8, 1984
9:30 o'clock a.m.

VOLUME VI

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE WALTER E. HOFFMAN, and a jury.

For the GOVERNMENT:	STEVEN A. SHAW, ESQ.
	WILLIAM C. HENDRICKS, III, ESQ.
	JAN N. LITTLE, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ.
	WILLIAM J. RAGGIO, ESQ.
	J. RICHARD JOHNSTON, ESQ.
Reported by:	CAPITOL REPORTERS Certified Shorthand Reporters BY: MARY E. BELL, CSR #98 108 West Telegraph Street Carson City, Nevada

RENO, NEVADA, WEDNESDAY, AUGUST 8, 1984, 9:30 A.M.

THE COURT: I take it we are ready to proceed with rebuttal testimony, gentlemen?

MR. HENDRICKS: Yes, your Honor.

MR. GOODMAN: Yes, your Honor. As a point of clarification, so we know how to frame our objection, it's our understanding as far as the rebuttal is concerned the prosecution should not be permitted to just repeat what has taken place in their case in chief if they are calling the same witnesses, unless it's a rebuttal of what one of our witnesses stated and that's our understanding.

THE COURT: Something that relates. They are confined to something that was brought out out direct or cross-examination in the presentation of the Defendant's case.

MR. GOODMAN: That is our understanding as well.

THE COURT: All right, call the jury, Mr. Marshal.

JAMES STATHOS, GOVERNMENT REBUTTAL WITNESS, SWORN

THE COURT: Good morning, ladies and gentlemen of the jury. Yesterday if you will recall the defense rested and the Government will now proceed with such rebuttal evidence as it may have. Mrs. Little?

MS. LITTLE: Thank you, your Honor.

DIRECT EXAMINATION

BY MS. LITTLE:

Q Would you please state your full name and spell your last?

A My name is James Stathos, S-t-a-t-h-o-s.

Q Where do you live?

A 7545 Young Circle, Reno.

Q Where do you work?

A At Pioneer Citizens bank in Nevada.

Q Is that here in Reno?

A Yes, it is.

Q How long have you worked at Pioneer Citizens?

A Since 1968.

Q What's your present position there?

A I'm senior vice president and cashier.

Q Would you describe briefly what your duties are in that position?

A As cashier I am responsible for all the operations in the bank which includes all the deposit applications and electronic data protesting, everything of that nature, everything except loans.

Q How long have you been in management positions at Pioneer Citizens?

A About 13 years.

Q In the course of your work over the years at Pioneer Citizens, have you become familiar with banking regulations concerning the payment of interest on customer deposits?

MR. GOODMAN: Objection, irrelevant. May I be heard outside the presence of the jury?

THE COURT: Members of the jury, you'll have to take that early morning walk.

(The proceedings continued in the absence of the jury.)

THE COURT: Since I don't know the nature of the next question and the questions to follow, I suppose it would be in order to go through the testimony to see what it's about.

MR. GOODMAN: Yes. Basically, your Honor, just so the Court could understand our position as to the objection, this witness I believe testified at the last trial and the essence of his testimony and it was not objected to then as I recall was the fact that certain moneys which are deposited in banks draw interest and the interest accrues and he would make certain computations as to what type of interest would have been earned had Judge Claiborne placed the $100,000 in an interest-bearing account or placed $50,000 in an interest-bearing account.

It's our position that that is not relevant and material to this case because Judge Claiborne determined not to place such moneys in an interest-bearing account and it really is a non-issue and it therefore is not relevant and material and that's what I wanted to present to the Court.

THE COURT: Well, there was a representation earlier to Judge Claiborne and he was asked why he did not place the money in an interest-bearing account. I'm speaking now of the original 100,000 or the 75,000 that was left or 80,000. Isn't that sufficient to at least establish, for the Government to establish that that money could have drawn specific interest over a period of time?

MR. GOODMAN: I believe that if the witness was to testify solely to the fact that money placed in certain accounts in a bank draw interest, I think that that's a truism. But Judge Claiborne chose not to put his money in a bank, made a decision that interest was not important to him and, therefore, for him to go through a computation as to how much interest could be earned in view of Judge Claiborne's position that he chose not to earn the interest would be irrelevant and would be prejudicial under 403 as far as the --

THE COURT: I don't think it would be prejudicial. I think that common knowledge is that people can deposit a sum of money in a banking institution and draw interest. Is it not common knowledge?

MR. GOODMAN: That is common knowledge and I believe the Court could take judicial notice of that. There's no need to have this witness testify as to what the interest would have been over the years when Judge Claiborne made the decision not to take the interest.

THE COURT: I don't think that I can take judicial notice of it and I have not been asked to do so. I will permit the testimony.

MR. GOODMAN: All right. Just so my record is --

THE COURT: Is that the purpose of it?

MR. GOODMAN: That was the purpose of my objection.

THE COURT: Was that the purpose of the Government's testimony?

MS. LITTLE: Yes, your Honor.

THE COURT: I will permit it.

MR. GOODMAN: Just so that the record is clear I would like to express the fact that the testify is going to certain interest in a situation where interest was not at issue.

THE COURT: Well, this gentleman, I assume, knows the rates of interest prevailing at various times between 1972 and 1978 and if he does he can make computations on that to show what interest would have been earned on the deposit. Call the jury.

THE COURT: All right, Mrs. Little.

BY MS. LITTLE:

Q Mr. Stathos, I believe you had just stated that in the course of your work in the bank you had become familiar with banking regulations concerning the payment of interest on customer deposits?

A Yes, that's correct.

Q Now directing your attention to the years 1972 through 1978, can you describe to the members of the jury what types of interest-bearing accounts were available to bank customers?

A It was general during that period of time there was only two types of interest-bearing accounts which were available. We were regulated by government regulations through the Federal Reserve called regulation Q and we had two types of interest-bearing accounts available, passbook savings accounts and time certificates of deposits.

Q Can you explain please what a passbook account is and what a time certificate of deposit?

A Generally a passbook savings account allows deposits and withdrawals to it regularly without any specific term to the deposit. A time certificate deposit has a specific term where the customer has to leave the deposit in the bank for a specified period of time.

Q Now during the years 1972 through 1978 you say that there was a regulation which determined the interest rate. Is that for both passbook and certificates of deposits?

A Yes, there were different rates for each type of deposit.

Q And that was set throughout the state of Nevada?

A Yes.

Q What was the interest for the passbook savings accounts from 1972 through 1978?

A From December of '72 to the period you requested me to research through June of '73, the book rate was 4 and a half percent. From July of '73 through August of '78 it was 5 percent.

Q And what time period was that compounded, that interest rate?

A Quarterly.

Q Quarterly?

A Yes.

Q And how about certificates of deposit, what was the interest rate for them during the years '72 through '78?

A Depending on the term and once again you asked me to do it on a year's basis, the rate was 5 and a quarter percent for anything less than a year, 6 percent for a term of a year.

Q Now did those rates fluctuate at any time? Were they dependent on any other kind of economic --

A No, they were by regulation, they were the maximum rate that we could pay. Banks could pay less. However, these were the maximum that we could pay.

Q And would that fluctuate with any kind of economic factors?

A Yes.

Q Did you perform some calculations of interest payments before coming here today?

A Yes, I did.

Q Considering first the passbook interest rates, based on your computations, if a customer had deposited $100,000 in a passbook account in December of 1972 and then made withdrawals over the years so that by August of 1978 he had $75,000, what amount of interest would he have earned during that period?

A He would have --

MR. GOODMAN: Objection. Without a proper foundation as to when the moneys were withdrawn I think that's impossible to answer.

THE COURT: I think you better rephrase the question because you must take the testimony with respect to when the withdrawals were made and what amounts.

BY MS. LITTLE:

Q All right, let's do it this way. Suppose there had been $75,000 deposited in December of '72 and left there until August of '78. What is the interest that would have been earned?

A At the passbook rate it would have been $24,222.16.

Q And if $100,000 had been deposit in December of '72 and left there until August of '78, what interest would have been earned?

MR. GOODMAN: Objection, assumes facts not in evidence.

MS. LITTLE: Your Honor, I'm trying to establish a bracket that what money was deposited would fit into.

THE COURT: I'll allow it.

THE WITNESS: $32,296.21.

BY MS. LITTLE:

Q So, Mr. Stathos, is it fair to say that in the hypothetical I previously described to you, that is where a customer had deposited originally $100,000 and ended up with $75,000 by August of 1978, the interest earned would have been somewhere in this bracket of $24,000 and $32,000?

A Depending once again on withdrawals.

Q But it would be within that bracket no matter when the withdrawals were made; is that correct?

A Yes.

Q How about for a time certificate of deposit? If a customer had deposited $75,000 in a time certificate of deposit in December of 1972 and left it there until August of 1978, what interest would he have earned?

A Once again reissuing the deposits, $30,137.90.

Q And how about if he had deposited $100,000 in December of 1972 and left it there until August of 1978?

A 37,881.29.

Q So if the situation were that the customer had originally deposited $100,000, made a few withdrawals over the years and eventually ended up with $75,000 in August of 1978, what is the range within which the interest he would have earned?

A On a time certificate between the $30,137, and the $37,881.

MS. LITTLE: No further questions.

THE COURT: Cross-examination?

MR. GOODMAN: That you. May I have exhibit 47, please?

CROSS-EXAMINATION

BY MR. GOODMAN:

Q Is it Mr. Stathos?

A Yes.

Q Mr. Stathos, you were asked to do certain computations by the prosecution, were you not, before testifying in court today?

A Yes.

Q Were you asked to compute what interest may have been obtained as a result of a $50,000 cashier's check being held by an individual for some 18 months? Could you tell us that?

A No.

Q You weren't asked to make that computation?

A No, I wasn't.

Q Now $50,000 for 17 months would have drawn interest if that was deposited in a passbook account or a time certificate of deposit, would it not?

A Yes.

Q At the same rates you testified to, correct?

A Uh-huh.

Q Now, Mr. Stathos, individuals do have safety deposit boxes at your bank, do they not?

A Yes, they do.

Q For their various personal reasons they keep cash in those boxes, do they not?

A Our bank has a general policy not to be aware of what customers put in their safety deposits boxes.

Q You close your eyes on it?

A We're just not aware of it.

Q Isn't it true, sir, that on occasion you open up safety deposit boxes especially in instances where people die?

A Yes.

Q And isn't it a fact that you find cash in them on occasion?

A Yes, we do.

Q Thank you. And that money in the safety deposit boxes doesn't draw interest, does it?

A No, it doesn't.

Q Thank you.

MS. LITTLE: No further questions.

THE COURT: All right. Thank you, Mr. Stathos, you may be excused.

PEGGY KOTECKI, GOVERNMENT REBUTTAL WITNESS, SWORN

THE COURT: Would you please give your full name and spell your last name, ma'am?

THE WITNESS: Peggy Kotecki, K-o-t-e-c-k-i.

DIRECT EXAMINATION

BY MR. SHAW:

Q Would you give us your business address, please?

A 1700 Desert Inn Road, Suite 412, Las Vegas, Nevada.

Q Could you perhaps pull the microphone closer to you?

A Is that better?

Q Yes, thank you. You work for Jerry Watson in Creative Tax Planning, do you not?

A Yes, I do.

Q When did you first start working for Mr. Watson?

A The first week in February, 1982.

Q As of that time who were the other employees of Creative Tax Planning?

A There was a receptionist by the name of Angie. I do not her last name.

Q Anyone else?

A And of course the two owners.

Q Whose that?

A Jerry Watson and Linda Lamb.

Q There was no one else named Peggy other than yourself?

A No, not then.

Q Since you started work in February of 1982 for Mr. Watson I take it you did not go over Judge Claiborne's 1980 witn him on June 15th, 1981; is that correct?

A No, I did not.

Q Did you ever see that return or have anything to do with the tax computations of Judge Claiborne prior to you beginning your work for Mr. Watson in February of 1982?

A No.

Q When were you subpoenaed to testify in this case?

A I was subpoenaed on July 24th and then again yesterday morning.

Q Yesterday morning by the Government?

A Yes, both are by the Government.

Q After you were subpoenaed yesterday morning did you advise anyone that you had been subpoenaed?

A Yes. I called Oscar Goodman's office. I needed to reach Mr. Watson on other matters but at the same time I also left a message that I had been subpoenaed and to please have Mr. Watson call the office.

Q When was that that you left that message with Oscar Goodman's office?

A It probably was between 10:00 and 10:30.

Q Yesterday morning?

A Correct.

MR. SHAW: Thank you.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. JOHNSTON:

Q Mrs. Kotecki, were you subpoenaed prior to the trial of the first trial of this case to testify before the Grand Jury?

A Yes, I was.

Q Did you advise Mr. Goodman's office of that?

A Yes, I did.

Q When you were originally subpoenaed on July 24th to testify at this trial did you advise Mr. Goodman's office?

A No. I don't believe so, no.

Q Were you still under the July 24th subpoena when you received another subpoena yesterday?

A I would think so, yes. I believe the subpoena says --

Q You hadn't been released?

A No. Not to my knowledge, no.

Q You were subpoenaed yesterday morning?

A Correct.

Q At what time?

A Oh, between 9:30 and a quarter to 10:00.

Q What time did the subpoena require you to appear here?

A It required me to appear here August 7th at 9:30.

Q That's yesterday morning?

A Yes.

Q That's prior to the time you were actually served with the subpoena; is that right?

A Served just about that time, yes.

Q Where were you served?

A In the office.

Q In Las Vegas?

A Creative Tax Planning office in Las Vegas.

Q Where is Mr. Goodman's office located?

A He used to be downtown. I don't know his exact address.

Q In what city?

A Las Vegas.

Q You testified that you did not review Judge Claiborne's 1980 return in June of 1981; is that right?

A That is correct.

Q That's because you weren't employed in Mr. Watson's office at that time?

A I was not employed then.

Q Did you later review the 1980 return?

A Yes, I did.

Q For what purpose?

MR. SHAW: Objection. It's certainly irrelevant to anything brought out on direct. The point is she didn't go over it with them in June of '81. What she did after she went to work for him is irrelevant.

MR. JOHNSTON: I submit I'm not limited to the precise date about when he questioned her, your Honor.

THE COURT: Well, I don't know what is forthcoming, of course. Mr. Shaw, do you want this done in the absence of the jury? I don't know what's coming. You gentlemen know. I assume that each of you have had an opportunity to talk with the witness at one time or another. I'm not saying Mr. Johnston has but someone has.

MR. JOHNSTON: I'll talked with her also, your Honor, just this morning.

THE COURT: Oh, you have too.

MR. SHAW: I've certainly talked to her as well. It's my view that anything after 1982 when she started working there isn't relevant to the counts of this indictment so if there's going to be a proffer I'd like to hear it outside the presence of the jury.

THE COURT: All right, ladies and gentlemen of the jury, we'll have to ask you to take that walk.

(The proceedings contineud in the absence of the jury.)

THE COURT: Proceed in the absence of the jury, Mr. Johnston, to define the relevancy of this question.

BY MR. JOHNSTON:

Q Mrs. Kotecki, did you review the 1980 return in the preparation of the return for the following year, 1981?

A Yes, I did.

Q Why did you look at the 1980 return when you were preparing the 1981 return?

A For the back-up information on it, what was in the 1980 return that I should carry forward to 1981.

Q Did you have particular -- did you particularly review the Schedule D that appeared in the 1980 return?

A Was there a schedule C in 1980? I don't recall.

Q Schedule D?

A I'm sorry, I misunderstood you.

Q Did you review the Schedule D in the 1980 return?

A I looked at it, saw the carry forward.

Q Would you explain what the carry forward was?

A It was a long term capital loss on the Judge's law practice that he had more or less abandoned when he became a Federal Judge.

Q Was it your understanding at that time that fees that had been received by Judge Claiborne during the year 1980 resulting from work he'd done before he became a Judge were reflected in that Schedule D in the 1980 return?

A I did not pay that much attention to it, no. I didn't really go that deep into it.

Q Did you have information to the effect that he had received additional fees in 1981 that related from his practice before he became a Judge?

A From the information that he gave me to prepare the tax return from, yes.

Q Can you tell us the amount or the approximate amount of the fees that were received in 1981?

A I believe it was approximately $40,000.

Q Now, you prepared the 1981 return, did you not?

A That is correct, yes.

Q Did you report those fees on a Schedule C in the 1981 return?

A No, I did not.

Q How did you treat them?

A I treated them as a recapture of a long term capital loss.

Q Was it your belief at the time that that is a proper way to treat those fees?

A Yes, it was. It still is.

Q How that did that treatment show up, then, in his 1981 return?

A A notation on the Schedule D, just the fact of recapture of prior losses.

Q Now the 1980 return showed a net capital loss carry-over of $97,000, did it not?

A In that neighborhood, yes.

Q Do you know recall specifically?

A Not specifically, no.

Q May I see Government's exhibit 5, please? I'll show you Government's exhibit 5 which is the 1980 return and direct your attention specifically to Schedule D of the return and ask you if it, in fact, shows a net long-term capital loss of $100,000, right?

A That is correct, yes.

Q And then on the face of the return do you see that $3,000 of that loss was claimed as a deduction in 1980?

A Correct.

Q And does that then leave a net capital loss carry-over of $97,000?

A No, it left 94,000.

Q 94,000. Can you explain to me how that is?

A You're only allowed to deduct one half of a long-term capital loss.

Q So what you're saying is that the deduction was one half of $6,000; is that right?

A That's right. 3,000 is all you're allowed but actually you're deducting 6,000 from your total.

Q So the carry-over then was 100,000 minus 6,000 or 94,000?

A That's right.

Q Did you carry that over to the 1981 return which you prepared?

A I carried the 94,000 over less 40,000 which would be --

Q And 40,000 were the fees received in 1981?

A That's right.

Q So you offset the fees received in 1981 against the net capital loss carry-over from 1980?

A Correct.

Q And what was the result of that offset? You don't recall exactly, you said?

A No, I don't recall the --

Q What the amount of fees was?

A No.

Q But whatever it was it's 94,000 minus the fees that were received in 1981; is that correct?

A Correct.

Q And again how much of a deduction is claimed for 1981 return?

A $3,000.

Q Now in your opinion was that a proper way to treat the fees that were received in 1981?

A Yes, I think so.

Q Will you tell us something about your own employment history, Ms. Kotecki? How would you classify yourself professionally?

A As a very good full-charge bookkeeper that can go a little bit higher than full charge.

Q How long have you been working at one place or another in that capacity?

A Since I was in high school in 1945.

Q And in the course of your work have you prepared income tax returns?

A Yes, I have.

Q Can you give us any estimate of how many returns you've prepared over the years?

A No, I can't.

Q Would it be in the hundreds?

A Yes, it would be.

MR. JOHNSTON: That's the burden of my offer of proof, your Honor. One more thing if I may, your Honor.

BY MR. JOHNSTON:

Q Mrs. Kotecki, did you on June 9th, 1983 write a memorandum to Jerry Watson?

A Yes, I did.

Q Is this the memorandum?

A Yes, it is and that is my signature.

Q Would you read it please?

A It is to Jerry D. Watson, re, Grand Jury, Judge Claiborne, one question. "Did Mr. Watson tell you how to prepare the 1981 return". "No. I asked Mr. Watson if the 40,000 was not a recoup of the long-term capital loss taken in 1980. I wanted to prepare the 1981 return in this manner. Mr. Watson said words to the effect, 'looks all right to me, go ahead'.

Item two, "Judge Claiborne signed the completed return on October 13th, 1982 in Mr. Watson's presence. The necessary copies were not completed because of copy machine problems and Mr. Watson's office agreed to mail the return which I did the afternoon of October 13th, 1982".

Item three, "As the Judge was leaving this office for an appointment after signing his return I asked the Judge if Mr. Watson had explained to him in what manner the $40,000 had been handled. He said, 'No, I will discuss that with you later". The 'you' is a broad one, meaning Mr. Watson".

And it is signed in my handwriting.

Q Did Judge Claiborne sign the 1981 return in your presence?

A I was not in Mr. Watson's office. The door was closed.

Q Were you aware of the length of time that Judge Claiborne was in Mr. Watson's office on that occasion?

A It may have been 15 minutes, it may have been 30 minutes.

MR. JOHNSTON: May I have just a moment? That's it, your Honor.

THE COURT: Do you wish to still press the objection?

MR. SHAW: Absolutely, your Honor. I asked her to state what date she began work and when she was subpoenaed and now all of a sudden we're into an entirely different tax year and what was in her mind a year later and what she wrote two years later. How does that go to when she began working for Mr. Watson?

MR. JOHNSTON: Doesn't go to that at all. It goes to the question of whether she examined the 1980 return and made any use of it.

THE COURT: I suppose she did.

MR. JOHNSTON: She was asked about that on direct.

MR. SHAW: We agree she looked at it. We testified to that.

MR. JOHNSTON: Counsel wants to ask her only the questions he wants to ask her.

MR. SHAW: Of course. That's the purpose of rebuttal.

THE COURT: She was asked if she examined the 1980 return and she said no, not at that time.

MR. JOHNSTON: Not in 1981 she didn't examine it.

THE COURT: But what she later did and what Mr. Watson may have felt which is completely in error, as to their knowledge of taxation problems. This evidence could be dangerous to the Defendant, I might add, but I'm going to sustain the objection.

MR. JOHNSTON: May I have just a moment? Thank you, your Honor.

THE COURT: We have enough problems with our 1979 and 1980 returns. I thought after a year that the 1980 return and what Judge Claiborne said that he'd read the return and he's bound to have read it after he got his refund check because he said he went to see Mr. Watson. That was well within a year's time, of course.

MR. JOHNSTON: Your Honor, the Court has permitted the prosecution to introduce a variety of kinds of testimony that relate to the '78 and '77 returns which are likewise not involved in this case.

THE COURT: They are not involved and the only thing that I've admitted if I recall correctly was Judge Claiborne testified what his salary was. You asked questions about 1977 and '78 as well as the others but they were for a very limited purpose. But in any event, we don't have the 1981 return in issue in this case.

MR. JOHNSTON: Very well, your Honor.

THE COURT: Would you have any further questions of this lady?

MR. JOHNSTON: I have no other questions of her, your Honor.

MR. SHAW: No, we have no other questions, your Honor.

THE COURT: Thank you, you may be excused, Mrs. Kotecki. Call the jury.

JOSEPH WRIGHT, GOVERNMENT REBUTTAL WITNESS, PREVIOUSLY SWORN

THE COURT: Mr. Wright has previously been sworn.

Mr. Shaw, let's not repeat with Mr. Wright because he was a lengthy witness previously and there's no need to repeat.

Members of the jury, the witness on the stand is Joseph Wright who previously was sworn and remains under oath.

MR. SHAW: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. SHAW:

Q Mr. Wright, you are the accountant who assisted Judge Claiborne in preparing his 1979 tax return; is that right?

A That's right.

Q Did Judge Claiborne at any time ever tell you that he had gotten the money to pay the '77 tax liability from the

Horseshoe Casino?

A No.

Q Did your office ever call Judge Claiborne's office to your knowledge requesting documents that you had lost?

A No.

Q Do you know of any tax documents that you or your office ever lost relating to Judge Claiborne?

A No.

Q Did Judge Claiborne's office regularly deliver receipts to you every month over the years that you were his accountant?

MR. JOHNSTON: This goes back into the same matter to which he testified in the early part of his testimony.

MR. SHAW: Mrs. Judy Ahlstrom's testimony.

MR. JOHNSTON: He testified, I can find it in the transcript.

THE COURT: He testified that, yes, they did.

MR. SHAW: He testified that they didn't. If there's any confusion, that's why I asked him.

MR. JOHNSTON: He's given his testimony on this point, your Honor.

THE COURT: What was your question again specifically?

MR. SHAW: Did Judge Claiborne's office, either the law office or the chambers, regularly, monthly give Mr. Wright receipts?

THE COURT: For what years and what time?

MR. SHAW: Between 1970 and the end of the time that he performed work for him.

THE WITNESS: No.

THE COURT: You computed the fees from the bank deposit statements, didn't you.

THE WITNESS: Yes.

MR. SHAW: May I inquire further on that?

THE COURT: Yes. I'm waiting for next question.

MR. SHAW: I'm sorry, your Honor, I thought the objection was pending.

BY MR. SHAW:

Q Was there any time period between 1970 and the end of the time you did work for him where you did more or less regularly receive fee receipts?

A Yes.

MR. JOHNSTON: Objected to as already asked and answered and --

THE COURT: Please don't repeat, Mr. Shaw. We can't go through this trial and each witness and what that witness said every time.

MR. SHAW: Very well, your Honor, I'll withdraw the question.

BY MR. SHAW:

Q Have you ever seen Judy Ahlstrom in your office?

A No.

Q Did you ever give Judge Claiborne the $22,000 figure for his 1979 legal fee over the telephone so that he could write it down on a work sheet and deliver it back to you?

MR. JOHNSTON: Objection. This was the subject of his testimony earlier in the trial. He's already answered that question.

MR. SHAW: I don't think he has specifically.

MR. JOHNSTON: I can find it in the transcript, if I have to.

THE COURT: Well, I don't have a transcript before me and I can't -- I'll let the question in but I wish you would avoid any repitition.

BY MR. SHAW:

Q Do you recall the question?

A Please ask it again.

Q Did you ever give Judge Claiborne the $22,000 figure for his 1979 legal fee over the telephone so that he could write it on a work sheet of his and deliver it back to you?

A No.

MR. SHAW: Court's indulgence.

BY MR. SHAW:

Q Mr. Wright, from August 31st, 1978 through roughly July of 1980 did you maintain a daily log of business that you conducted in your office?

A Yes.

MR. JOHNSTON: Objected to as irrelevant.

THE COURT: He has previously testified about a log and you gentlemen reached an agreement with respect to one entry.

MR. SHAW: Yes, your Honor, but beyond that what I would propose to do is set the foundation for the introduction of log entries that would rebut items that Judge Claiborne testified to.

THE COURT: You may ask him what log entries if any he got from Judge Claiborne but we're now not dealing with that question.

MR. SHAW: I think the Court misunderstood or I misstated my proffer. What I meant to say was that these log entries would show what Mr. Wright did on certain days or did not do on certain days and that would go to rebutting what Judge Claiborne testified he had done on those days.

MR. JOHNSTON: This gets so convoluted, your Honor, I'd renew my objection.

THE COURT: There has been no discussion as I understood it as to log entries except for one on August 31st, wasn't there?

MR. SHAW: That's all the discussions that there's been, yes. But Judge Claiborne testified to specific things that had happened on certain days and now we would use or offer this evidence to show that didn't happen. I mean there are specific instances that were brought up by Judge Claiborne.

THE COURT: Well, he may refresh his memory from any log entry that he has, if any.

MR. JOHNSTON: Your Honor, excuse me, if there's going to be extended discussion I think it should be outside the presence of the jury. I'm sorry. We're in effect going to get the testimony this way sooner or later.

THE COURT: Do you have your log entries with you now?

THE WITNESS: Not in my possession, sir.

THE COURT: Are they here in this building?

THE WITNESS: Yes.

THE COURT: Well, go get them and in the meantime, members of the jury, you will step out.

(The proceedings continued in the
absence of the jury.)

(Government's Exhibit 48 was marked
for identification.)

THE COURT: Go get your log entries, Mr. Wright.

MR. SHAW: Your Honor, I would show to the Court what we have premarked as exhibit number 48 which is what we were going to set the foundation for moving into evidence which is --

THE COURT: I asked him to go get the log entries.

MR. SHAW: All right. I didn't mean to -- I thought this would satisfy what the Court desires.

THE COURT: There's no use in doing this piecemeal. Somebody is going to attack it. I may have to examine them in camera.

MR. GOODMAN: Your Honor, while Mr. Wright is getting the book, it's our position, of course, that the absence of any entries should not bind Judge Claiborne.

THE COURT: I don't say that they do.

MR. RAGGIO: Your Honor, may I step out a moment while we're waiting for Mr. Wright?

THE COURT: Yes.

THE COURT: All right, Mr. Shaw, continue in the absence of the jury.

BY MR. SHAW:

Q Mr. Wright, did you maintain a daily log of business you conducted between August 31, 1979 and July 1980?

A Yes.

Q As well as other dates?

A Yes.

Q What was the purpose of the daily log that you maintained?

A Basicly for time records and billing purposes and to keep track of what I actually did.

Q How soon after the event occurred would you in your normal practice made the entry into your log?

A Sometimes at the time, directly after and at the end of the day I would recap, review my notes and if anything has been left out I'd try to remember and put it down.

Q Would other employees of yours use any other records for any purpose?

A My secretary would record, go through the documents, I mean my time and record all entries on the time sheet accumulated for a month all the time for one client.

Q And then she would make a mark of some sort on your log to show that she had made that transfer?

A Yes.

Q Would the entries indicate when they were made?

A Yes.

Q Is it your practice during the time frame that I just mentioned to enter into the log every conversation and meeting that you had with your clients?

A Yes.

THE COURT: That's from August 31, 1978 to when?

MR. SHAW: July 1980, your Honor. It would be June 18th, 1980.

THE COURT: All right.

MR. SHAW: Your Honor, at this time I would have asked him to identify what we have premarked as Government's exhibit number 48.

MR. GOODMAN: We don't have a copy, your Honor.

MR. SHAW: That's what I'm inquiring about. Sorry, we don't have another copy of that.

MR. JOHNSTON: We'd like to have a copy, your Honor.

BY MR. SHAW:

Q Is Government's exhibit 48 a true and accurate copy of all of the entries between August 31, 1978 and June 18th, 1980 that related to work you performed for Judge Claiborne?

A Yes.

Q And these copies were made from your original log book, were they not?

A Yes.

Q There are what appear to be blocked-out portions of those entries. Could you tell us what that represents?

A That's blocking out the names of other clients that are on this, on each day.

Q Are any portion of the entries relating to Judge Claiborne blacked out in this exhibit 48?

A No.

MR. SHAW: At this time, your Honor, I would have moved Government's exhibit 48 into evidence.

MR. JOHNSTON: May I have just a moment, your Honor?

MR. GOODMAN: Your Honor, unless I misunderstand the witness it would appear all we have are selected portions rather than the complete diary or time record. I believe that we are entitled if they are moving to select a selected portion that I be allowed to see the entire document.

THE COURT: I will review them in camera before I admit them.

MR. JOHNSTON: They started in April of 1980 and the critical dates are back in 1978.

THE COURT: The one I have begins Thursday, August 31st, 1978.

MR. JOHNSTON: We have a copy of the August 31st page which was set up by mail. Your Honor will remember during the early part of the trial Mr. Wright testified that he used that to refresh his recollection and arrangements were made to provide us a copy so we have that. In looking at what I thought was a copy of what's being offered now and this is not on our copy of that, at least.

THE WITNESS: That is true.

MR. SHAW: What counsel is saying is in the copy we just handed him it did not include the September 1st page and we will certainly provide that to them.

MR. JOHNSTON: I'm talking about the August 31st page and if there's a September 1st page we don't have that.

MR. SHAW: They have the August 31st date.

THE COURT: I have it here, gentlemen. I can't answer for wha copies were provided to you but if you wish to look at what I have here, you're welcome to do so. I have Friday, September 1st, 1978, although I must say to you that I don't see anything on that page that makes even casual reference to Judge Claiborne but I take it that these were all submitted -- no. Then you skip into Saturday, April 5, 1980.

MR. SHAW: The witness I believe has testified that during this time frame this is the complete listing of the work that he did for Judge Claiborne where Judge Claiborne is mentioned on the diary. It's certainly not a complete list of his diary.

THE COURT: Look at 48, September 1st, if you will, Mr. Wright, and tell me what is applicable to that as to Judge Claiborne.

MR. SHAW: Your Honor, the purpose of September 1st is different from the purposes of introducing an entry as to Judge Claiborne. The proffer as to September 1st would be that Judge Claiborne testified that on that morning Mr. Wright had picked up some documents from him and I would inquire of Mr. Wright first of all as to the lack of an entry to that effect and also that he was doing other business for three hours that morning as the Court would note, IRA audit, three hours on an unrelated client.

MR. JOHNSTON: The point seems to be, your Honor, that because there's no entry in the diary nothing was done and I suggest that's kind of --

MR. SHAW: It would be probative based on Mr. Wright's response when he would say and has already said that it was his practice to make entries every time he met or talked with his clients.

THE COURT: Well, the question is do you wish for me to examine in camera? Does defense counsel wish for me to examine in camera all of Mr. Wright's various dates, some of which are obviously not here?

MR. GOODMAN: Your Honor, in response to that if we could have a moment to go through this, it may not be necessary. We may not make that request.

MR. JOHNSTON: We'd like also to see a copy of the September 1st page which we still have not seen, your Honor..

THE COURT: Well, I will hand you mine.

MR. JOHNSTON: Thank you, your Honor. I thought maybe Mr. Shaw was going to give me one.

MR. SHAW: Well, I don't have a copy machine right here, Mr. Johnston, or I would have provided one.

THE COURT: Mr. Shaw, my problem is that on the September 1st page Mr. Wright has correctly blocked out the name of his client. I suppose on cross-examination he's asked who the client was.

MR. SHAW: Well, I would suspect he'd have to reveal it if it survived the relevancy objection, your Honor.

THE COURT: Of course he'd have to reveal it if it's relevant but suppose it's not relevant? He can say, of course, "I've blocked out the names to protect the confidentiality of a client", and that's entirely proper. That's about the best he could do.

MR. SHAW: I mean I would object to relevancy if that occurred.

THE COURT: I know you'd object. I'm not worried about that.

MR. SHAW: I'd also while counsel is viewing that, would direct you to rule 8037 which speaks in terms of absence of entries in records that are regularly conducted and the significance of the absence of entries and it's under that rule that we would offer one other two other programs, three pages in this proposed exhibit that have no entries relating to Judge Claiborne.

MR. GOODMAN: Your Honor, may I ask Mr. Wright what certain words say? Our copy is not clear. I can't read them and I may be able to resolve any type of in camera inspect.

THE COURT: And I'm sure he can read his own handwriting.

MR. GOODMAN: That's right. All right, thank you.

CROSS-EXAMINATION

BY MR. GOODMAN:

Q Mr. Wright, you have before you your diary for August 31st, do you not?

A Yes.

Q And there's a notation there about 3:30. Could you please read it to me?

THE COURT: "Took Harry Claiborne envelope to Jenny".

MR. GOODMAN: And then there's a one/half under it.

THE WITNESS: Yes.

BY MR. GOODMAN:

Q There's no reference to Harry Claiborne on September the 1st; is that right?

A That is right.

Q Now I can't read a notation on Tuesday, April 8th about 10:00 o'clock?

A "Worked on Harry Claiborne's data and talked to Judy, his secretary, and got W-2 data from her and figured approximate tax, two hours".

Q Turning on the next page, Wednesday, April 9th, about 12:00 o'clock?

A "Harry Claiborne didn't show and I called Judy in the afternoon, one and a half hours".

Q Turning to April the 10th which is a Thursday, 12:00 o'clock, could you read that notation?

A Thursday at 10:00 o'clock?

Q No, about 12:00 o'clock.

A 12:00.

Q You say, "Instructions" -- something, "Title company with" --

A "Instructions at title company".

Q At title company?

A Yes.

Q Would that reflect that you were not in your office from about 11:45 to about 12:30?

A I would say so.

MR. GOODMAN: Those are all the questions I have, your Honor. No, excuse me.

I would ask the Court for some direction as to the entry on Monday, June 16th where there's some excisions. We believe that that information may be necessary to go into on cross-examination.

THE COURT: Under July 16th?

MR. GOODMAN: Yes, around 12:15. It starts "Saturday 11:30 for Harry Claiborne, re, more info", and "worked on his return", and then there's a line and then a blank, "but she has not called back by 5:05 and neither has" blank.

THE COURT: You wish for me to examine the original document?

MR. GOODMAN: Yes, it may be pertinent.

THE COURT: Would you pull me the original June 16th document, Mr. Wright?

The original document refers to a name that I've not heard mentioned at all and apparently the arrow, of course, from the 11:15 to 11:45 entry then goes down to 1:45 and at 1:45 it shows Harry Claiborne returned and he was in later, two and three/quarter hours. I will be glad to put into the record for appellate purposes if necessary and I hope it's not necessary one way or another, the original names that appear on the June 16th, 1980, but I can only say to you that the names of two women here are completely foreign to -- in fact, the second name is only given by the lady's first name. There is no second name. The first name is blacked out but does give apparently her first and last name.

MR. GOODMAN: Perhaps I could understand it if I asked Mr. Wright.

BY MR. GOODMAN:

Q Do you have June 16th in front of you?

A Yes.

Q Do you see the arrow that goes from 11:15 down to about 11:45?

A Yes.

Q There is an incident which takes place apparently between 12:15 and 1:15 on your diary. Does that have anything to do with the preparation of Judge Claiborne's return?

A No.

Q So, in other words, you made your initial entry around 11:15 and then you at sometime later have an entry which appears about 1:45; is that correct?

A Yes.

Q Now that doesn't reflect that Harry Claiborne came to your office at 1:45, does it?

A No.

Q He came in some later time that day?

A That's right.

Q And you had spent some two and three-quarters hours before Judge Claiborne even got there?

A Including his time there. The total time for that day was two and three-quarters hours.

Q But you don't have any independent recollection as to how long Judge Claiborne was at your office on Monday, the 16tn, do you?

A No, that's right.

MR. GOODMAN: I understand it now, your Honor.

THE COURT: Now you indicated that if you were given an opportunity to review this that you may not have any objection. I would assume that it clearly would come under Rule 803(6) and also for what it may be worth would come under Rule 803(7) of the Federal Rules of Evidence. I take it there is no objection?

MR. GOODMAN: That is correct.

THE COURT: All right. Call the jury then, Mr. Marshal.

All right, Mr. Shaw, you may proceed.

MR. SHAW: Thank you, your Honor.

DIRECT EXAMINATION (Resumed)

BY MR. SHAW:

Q You maintained a daily log of your business that you conducted as an accountant between August 31, 1978 and June 18th, 1980?

A Yes.

Q And I take it you maintained that log both before and after those dates as well; is that correct?

A Yes.

Q What was the purpose of your log?

A To keep track of what I'm doing each day for billing purposes and to remind me possibly of what I did. So it's for billing purposes and to recall what you're doing during the day.

Q Would any of your employees conduct any of your business by use of that daily log?

A Yes. My secretary would record all the entries on a time sheet, accumulating the time for a month.

Q Would she make any notations on your daily log indicating that she had made that transfer?

A Yes. She circled the time of each client whenever she had it posted.

Q How soon after each event occurred would you record that event on your daily log?

A Usually as it happened or right after it's happened. And then at the end of the day I would review in my mind what happened that day and if anything was missing I would add it.

Q Were the entries that you made accurate at the time that they were made?

A Yes.

Q Was it your practice to enter into the log every conversation and meeting that you had with your clients?

A Yes.

Q Do you have in front of you what has been marked as Government's exhibit 48?

A Yes.

Q That is a true and accurate copy of all of the entries made in your daily log between August 31, 1978 and June 18th, 1980 with respect to work that you performed for Judge Claiborne?

A Yes.

Q And those copies are made or were made from your original log books; is that correct?

A Yes.

Q I note that there are certain blacked-out portions of these daily sheets that are part of exhibit 48; is that correct?

A Yes.

Q Could you tell us what is blacked out, what type of information?

A It's the names of other clients that are noted on my daily log.

Q Are any portions of any of the entries having anything to do with Judge Claiborne blacked out?

A No.

MR. SHAW: Your Honor, we would move exhibit 48 at this time.

MR. GOODMAN: Your Honor, again I'm sorry, the copy we have seems to stop on June 16th and I understood counsel to refer to June 18.

THE COURT: Well, I'm sorry. The one I have goes through June 18th.

MR. JOHNSTON: Could we just see the last two, your honor, because we haven't seen those yet?

THE COURT: Monday, June 16th and the next entry I have is Wednesday, June the 18th.

MR. SHAW: Now the record may reflect that I'm giving a copy of the June 18th log to Mr. Goodman.

MR. GOODMAN: Thank you. We have no objection, your Honor.

THE COURT: All right. It will be admitted in evidence as Government's exhibit what?

MR. SHAW: 48, your Honor.

THE COURT: 48. ///

(Government's Exhibit 48 was admitted into evidence.)

BY MR. SHAW:

Q Mr. Wright, directing your attention now to Government's exhibit number 48 and specifically to your log entries of August 31, 1978, do you have that in front of you?

A Yes.

Q Does that log entry reflect any activity with respect to Judge Claiborne?

A Yes.

Q Could you read the entry that relates to Judge Claiborne?

A "Took Harry Claiborne envelope to Jenny, half hour".

Q What time is reflected on that?

A 3:30.

Q Is there any reference on the August 31, 1978 log to you having spoken, you personally, with Harry Claiborne?

A No.

MR. JOHNSTON: We will object, your Honor, on the ground that the document speaks for itself.

THE COURT: He may ask that question.

MR. JOHNSTON: It's in evidence.

BY MR. SHAW:

Q There's no such entry?

A No.

Q Was it your normal practice that had you talked to Harry Claiborne that you would have recorded that on this document?

A Yes.

Q Directing your attention, if I may, to September 1, 1978, is there any entry on that date reflecting any work that you performed for Harry Claiborne, Judge Claiborne?

A No.

Q Is there any indication that you picked up any document or dropped off any documents at his office that day?

A No.

Q What does this signify that you did that morning?

A I was in an Internal Revenue Service audit for three hours.

Q Beginning at what time?

A About 10:30.

Q And that related to some other client totally unrelated to Judge Claiborne; is that correct?

A Yes.

Q During that time what time would you normally come into your office?

A About 10:00 o'clock.

Q Now your normal business practice is that you would normally come in at 10:00 o'clock. You had a three hour IRS audit coming in at 10:00. What would you be doing between 10:00 and 10:30?

A Preparing for it.

Q For the audit?

A Yes.

Q If you would turn your attention to April 5, 1980, which is a Saturday; is that correct?

A   Yes.

Q   Are there any entries there related to Judge Claiborne?

A   Yes.

Q   Could you tell us what time that entry was made and read it?

A   "At 2:00 o'clock at the afternoon Harry Claiborne was in and will be in Monday at noon, three-quarters hours".

Q   Are there any other entries on that date relating to Judge Claiborne?

A   No.

Q   Directing your attention to the next document which is Monday, April 7, 1980, did you have any meetings or conversations with Judge Claiborne on that date?

A   No.

Q   Are there any entries relating to him on April 7th?

A   At 12:00 o'clock I have "Harry Claiborne didn't show".

Q   Are there any other entries on that date relating to Judge Claiborne?

A   No.

Q   Directing your attention to the next day, Tuesday, April 8th, 1980, are there any entries relating to Judge Claiborne on that date?

A   Yes.

Q   What time is that entry and would you read it, please?

A   It's 10:00 o'clock, "Worked on Harry Claiborne data and talked to Judy", his secretary, "and got W-2 data from her and figured approximate tax, two hours".

Q Are there any other entries on that date relating to Judge Claiborne?

A No.

Q Are there any entries suggesting that you had any conversations either over the phone or personally with Judge Claiborne on April the 8th?

A No.

Q Directing your attention to Monday, April 9th, 1980, are there any entries relating to Judge Claiborne?

A Yes.

Q Would you give us the time and read it?

A 12:00 o'clock, "Harry Claiborne didn't show and I called Judy in the afternoon, one and a half hours".

Q Are there any other entries on that date related to Judge Claiborne?

A No.

Q Directing your attention to Thursday, April 10, 1980, are there any entries related to Judge Claiborne?

A No.

Q And there's no entry indicating that you called Judge Claiborne to get information relating to salary or his W-2 or anything else, is there?

A No.

Q Had you made such a call to Judge Claiborne would you have recorded it in this daily log?

A Yes.

Q The next date, Friday, April 11th, 1980, are there any entries related to Judge Claiborne?

A Yes.

Q Would you give us the time of that entry and read it, please?

A 5:30, "Harry Claiborne estimate to pay on extension and so forth and he was in later, one and a half hour".

Q Is there any indication on the April 11th, 1980 daily log that indicates that Judy Ahlstrom or anyone else came to your office from his office other than Judge Claiborne personally?

A No.

Q Based upon your knowledge of your business practices at that time had Judy Ahlstrom delivered anything to you on that date would you have entered it on your log?

A Yes.

Q Directing your attention to Thursday, May 1st, 1980, are there any entries relating to Judge Claiborne on that date?

A No.

Q Is there any entry on that date that would remind you of any conversation that you had with Judge Claiborne?

A No.

Q Does the May 1st entry indicate to you what you did that evening, if anything?

A I worked on the food festival for three hours.

Q Beginning at what time?

A 5:00 o'clock.

Q Now directing your attention to the next date, May 2, 1980, are there any entries related to Judge Claiborne?

A Yes.

Q Can you give us the time, please, and read it?

A "10:00 o'clock, called Judy at Harry's office, Harry Claiborne's office, half hour".

Q Is there any entry on Friday, May 2nd, 1980 that shows that Judge Claiborne came to your office with work papers and blank signed 1040's?

A No.

Q Had he done that would you have recorded that in your daily record in the normal course of your business?

A Yes.

Q What does it show that you did in the afternoon of May 2nd?

A Ordered some supplies at 2:00 o'clock and left on a vacation.

Q So you're out of the office at 2:00 o'clock on that date?

A Yes.

Q Directing your attention to the next entry which is Saturday, June 14th, 1980, does that indicate that you performed any work for Judge Claiborne on that date?

A Yes.

Q Could you give us the time and what the entry states?

A "10:15, worked on Harry Claiborne".

Q Does it indicate the amount of time that you worked on Harry Claiborne that date?

A No.

Q Are there any other entries on Saturday, June 14th, 1980 relating to Judge Claiborne?

A No.

Q If you would turn the page to Sunday, June 15th, 1980, are there any entries relating to work that you performed for Judge Claiborne on that day, Sunday?

A Yes.

Q Could you give us the time and read the entry?

A "2:00 o'clock, worked on Harry Claiborne's tax return, three hours and tried to reach Judy to get Harry's phone number".

Q Are there any other entries at all on June 15th, 1980?

A No.

Q Directing your attention to Monday, June 10th, 1980, are there any entries relating to Judge Claiborne?

A Yes.

Q Would you read those, please?

THE COURT: And the time.

THE WITNESS: "11:15, called Harry Claiborne, re, more information and worked on his return". And then an arrow is drawn down to make an additional note at the bottom of the page. "Harry Claiborne returned and he was in later at two and three-quarters hours for the day".

BY MR. SHAW:

Q That was a total two and three-quarters hours for all work you did for Judge Claiborne on June 16th?

A Yes.

Q Did he come in later that afternoon?

A Yes.

Q What was the date that the 1980 tax return needed to be filed by?

A The 15th.

Q June 15th, 1980?

A Well, actually you have until the 16th. When the deadline falls on the Sunday you have the next business day.

Q Now based upon your knowledge of your business practices and these business records that you maintained would you have information relating to whether Judge Claiborne signed the tax return in your office the afternoon of June 16th?

A Yes.

Q What is that information?

A That he signed it.

Q On June 16th, 1980, in your office?

A   Yes.

MR. SHAW: Court's indulgence one moment.

BY MR. SHAW:

Q   If I may show you Government's exhibit number 3 which is the 1979 tax return, and specifically the envelope which is attached to it, could you tell us the date that the envelope mailing the '79 tax return to the IRS was postmarked?

A   The 16th of June, 1980.

Q   What is your normal practice with regard to how you mail returns, what time of day and where you mail them?

A   If I'm mailing a return we take them to the Main Post Office and I would do that when I left the office. On a deadline date or any deadline date we normally had numerous envelopes to go to the Post Office, we never mailed anyplace other than the Main Post Office.

THE COURT: If you cover the June 18th, Wednesday, that will complete it?

MR. SHAW: Yes, your Honor.

BY MR. SHAW:

Q   The next day is June 18. Is there an entry regarding Judge Claiborne on that date?

A   Yes.

Q   Could you tell us the time and what it says?

A   "6:15 dinner for Harry Claiborne".

Q   Do you recall what event that was?

A He came to my home for dinner with me and my family.

Q It was a social meeting?

A Yes.

Q Now, Mr. Wright, did you receive a telephone call from Judge Claiborne early Monday morning just two days ago of this week?

A Yes.

Q Would you tell us about what time that was that he called you?

A Quarter after 7:00.

Q What did he ask you in that telephone call?

A Asked about my health and questioned the total time that we had related in the prior trial where I enumerated 100 hours of time since we started the case and was questioning how much time I had spent since the last trial and questioning how much of that was since the last trial and whether I was going to have to be back up or not.

Q He asked you whether or not you were going to have to be back up to testify here again?

MR. JOHNSTON: I'll object to this as irrelevant, your Honor.

MR. SHAW: I believe it's relevant.

THE COURT: Well, there was no objection at that time first but if we are going into the conversation I assume it's admissible in its entirety. But you're leading him now and this is a new matter.

MR. SHAW: I'll rephrase the question.

BY MR. SHAW:

Q Mr. Wright, would you tell us what the last question was you just told us about that Judge Claiborne asked you two days ago?

A If I was going to have to be back up again.

Q What did you understand that to mean?

MR. GOODMAN: Objection.

MR. JOHNSTON: Objection.

THE COURT: What did you answer?

THE WITNESS: I hadn't been notified that I would.

BY MR. SHAW:

Q Was that true?

A Yes.

Q When were you notified to be back up here again?

MR. JOHNSTON: Objection, it's irrelevant. It doesn't mater when he was notified.

THE COURT: I don't think it is relevant. It was after that time, obviously.

BY MR. SHAW:

Q In the spring of 1981 did you have more clients than you could adequately take care of?

A No.

Q Now between 1977 and the time where you no longer did any work for Judge Claiborne, what was the annual fees that you were charging him?

MR. JOHNSTON: Objection, it's irrelevant.

MR. SHAW: Judge Claiborne testified to a particular fee, your Honor, and he was not allowed to testify on direct about that.

MR. JOHNSTON: I'm sorry, Judge Claiborne's testimony was very uncertain on that and it came in on cross, not direct.

THE COURT: Wasn't this brought out in direct and if not, why not?

MR. SHAW: It was objected to and sustained at that time, your Honor.

THE COURT: All right, I will permit it.

BY MR. SHAW:

Q Do you recall the question, Mr. Wright?

A Would you repeat it, please?

Q Between 1977 and 1979 what were the annual fees that you would charge Judge Claiborne for the work that you performed?

A $600.

Q What did that include, what type of work?

A Everything that we performed for him, the bookkeeping the tax return, everything that we did for him, it was a retainer.

Q Now finally, Mr. Wright, I would direct your attention to page 403 of your testimony on March 16th, 1984 and ask you if you gave these answers to these questions.

MR. JOHNSTON: Objection, your Honor. Unless counsel proposes to impeach his own witness I think this is improper. You can't bring in testimony by reading it back to him.

THE COURT: I don't have the remotest idea of what's in the testimony.

MR. SHAW: It would be offered as a prior consistent statement based on Judge Claiborne's testimony. I can show it to the Court.

MR. JOHNSTON: That's only if he's impeached by a prior inconsistent statement.

THE COURT: I will sustain the objection. We've covered that. That was brought out on direct.

MR. SHAW: That would be all I have, Mr. Wright.

THE WITNESS: I beg your pardon?

MR. SHAW: That would be all of my questions of you right now.

THE COURT: Cross-examination?

RECROSS-EXAMINATION

BY MR. JOHNSTON:

Q Mr. Wright, when were you told that you were going to be asked to reappear today?

A 7:00 o'clock Monday night.

Q 7:00 o'clock Monday night?

A Yes.

Q By whom were you told?

A My wife. I'd left the office to take her to the airport and when I got there she told me that I was going to have to go also.

Q Where did she get the information, if you know?

A Someone called her from Reno. I'm not sure who.

Q Since you learned that you were going to appear to testify again today, have you talked with any of the Government representatives in preparation for your testimony this morning?

A Yes.

Q With whom?

A Mr. Don Skelton, Steven Shaw.

Q When?

A Monday night, Tuesday, this morning.

Q How much time did you spend talking to them Monday night?

A About three hours.

Q Where was that?

A In the Airport Plaza Hotel.

Q I'm sorry, I couldn't hear you?

A Airport Plaza Hotel.

Q In Reno?

A Yes.

Q That was Monday night. How about Tuesday?

A In the federal building here in their offices.

Q Again with Mr. Skelton and Mr. Shaw?

A Yes.

Q How much time did you spend on Tuesday with them?

A I really couldn't relate to that. During the day at different times we'd discuss different things off and on.

Q How many different times during the day?

A Maybe three, four possibly.

Q Three or four times?

A Uh-huh.

Q Can you give us any estimate at all of the total amount of time that you spent with them on Tuesday?

A Four hours.

Q That was just yesterday?

A Three, four hours, uh-huh.

Q About four hours, all right. Did you talk with them again today?

A Yes.

Q This morning?

A Yes.

Q With Mr. Skelton and Mr. Shaw again?

A Yes.

Q How much time did you spend with them this morning?

A 20 minutes.

Q Now in the course of those meetings did they go over with you each question that they proposed to ask you this morning?

A Yes.

Q Was there discussion about what your answer would be for each question?

A Well, I answered them, yes.

Q Did they make suggestions to you or comments about what your answers should be?

A I suppose you could say that.

Q Did they tell you what Judge Claiborne's testimony had been earlier in the trial?

A Certain few remarks were made about that. The fee that we just discussed a minute ago was mentioned.

Q The annual fee?

A Yes.

Q What else did they tell you about Judge Claiborne's testimony?

A He said that he had related certain things that he had done on certain days that I had notes made on in my diary.

Q Did they gave you those dates?

A Yes.

Q You then checked in your diary to see if you had notes?

A Yes.

Q Now let me understand if I may, Mr. Wright. The purpose of the diary, the primary purpose is to record your time for billing purposes?

A Yes.

Q But you didn't bill Judge Claiborne on a time basis, did you?

A No.

Q What was the purpose of recording the time that you spent on Judge Claiborne's matter in the diary?

A To help relate to my total time for the day so if I'm recording two hours I need to know something about what that is in my total day's schedule, whether I'm missing a lot of work that I possibly didn't write down, see.

Q You're not reporting to anybody else how you spent your time, are you?

A I'm not sure I understand the question.

Q Well, the record of your time isn't something that you submit to anybody else for approval or review, is it?

A I submit it to my secretary who records it so that we can bill, yes.

Q But she doesn't pass on whether you've used your time profitably or unprofitably, does she?

A No one has done that in 30 years.

Q And your secretary is your wife, right?

A That is right.

Q If the purpose of the diary is primarily to account for your time and in Judge Claiborne's case at least it's not for billing purposes, is it?

A No.

Q Did you ever add up at the end of the year how much time you'd put in on Judge Claiborne's matters?

A No.

Q Would you know if I asked you?

A No.

Q If you would look at the entries on June 18th, please, that's the final page in the group of pages that you have before you, is it not?

A Yes.

Q What is the entry there at 6:15?

A Dinner for Harry Claiborne.

Q What was the purpose of entering that in your diary?

A Something that I did that day.

Q When did you make the entry?

A Could have been that day or the day before. Certainly to remind me that I was going to have to be home.

Q Do you think the entry may have been made substantially later than that?

A No. I would say it would have to be made that day or possibly before. It's an indication to me, that's a reminder. I normally come in at even 10:00 o'clock and I'm at work until 9:00 or so. My normal hours are to work later rather than earlier. So if I have an early appointment I might tend to work through.

Q Does the diary serve as an appointment book as well as a record of how you spent your time?

A Yes, it is an appointment book that I also record what I did and also how much time it took and what I worked on that day. It serves three purposes.

Q So you would be making entries in the diary then in advance if you have scheduled an appointment a week later, you'd make an entry in the book indicating an appointment? Can you direct my attention to such entries in the pages that you have there that indicate appointments rather than a record of time spent?

THE COURT: Take a look at the first page, the entry at 6:30 p.m., does that correspond?

THE WITNESS: The first page? Is that August 31, sir?

THE COURT: Yes.

THE WITNESS: That's the Exchange Club. That is an appointment-type entry.

BY MR. JOHNSTON:

Q Can you direct me to any entries that show appointments with clients?

A On August 31, 1978, Saturday 6:30 I have written "Exchange Club".

Q That's a meeting of some sort?

A That's a service club that I belong to and we were having a dinner meeting that night.

Q Is that professional work that you charge for?

A No. It is an appointment that I have to go to. I thought that's what you wanted.

Q Can you show me any entries that indicate any appointments for clients for professional work that you normally would bill for?

A On May the 2nd, 1980 I have a note to call Judy, half hour.

Q That's on May the 2nd?

A Yes.

A At 11:00 o'clock I was to call Judy, which I did do. Later I inserted the half hour.

Q Are you telling me then that you first made the notation in there to remind you to call Judy at 11:00 o'clock?

A Yes.

Q Was there some particular reason for calling her at that hour rather than some other time?

A What this means to me is just to call her in the morning.

Q But you're saying that's a record that you were reminding yourself to call her rather than a record put in afterwards that you had called her; is that right?

A That is right.

Q Does that indicate that you spent half an hour talking to Judy on Friday, May 2nd?

A Not necessarily total time talking to Judy but it would be the total time ionvolved talking with her and then probably doing something relative to the calling.

Q There is no indication here of anything that you said, is there?

A No.

Q If you did something relative to the call why didn't you note it in the diary?

A Well, a half hour isn't much time to do something in my business and so it wouldn't be something that might require an explanation of what I did. If it was a very pertinent thing I might indicate it even though it was a short period of time.

Q All right. But what you're telling me then is that this was a notation that you made reminding you to make a telephone call?

A That is right.

Q Do you find any entries at all that record appointments where you noted down in advance of the date an appointment with a client?

THE COURT: While he's doing that, members of the jury, you've had several breaks but no one else has so we'll take our mid-morning break.

Court will take a ten minute recess.

(A short recess was taken.)

THE COURT: Call the jury, Mr. Marshall.

I note Judge Claiborne is not here, gentlemen.

MR. GOODMAN: I'll get him, your Honor.

THE COURT: He is now present.

All jurors present. You may proceed, Mr. Johnston.

BY MR. JOHNSTON:

Q Mr. Wright, is it your testimony that no document was ever lost in your office?

A To my recollection.

Q You can't remember any instance where you looked for a document that you thought you had and couldn't find it?

A Are you talking about relative to Judge Claiborne?

Q No, sir, just generally. I think your testimony on direct was that you couldn't remember any document ever being lost in your office; is that right.

MR. SHAW: I object, your Honor, that's not a fair characterization. His activity was with tax matters related to Judge Claiborne.

MR. JOHNSTON: That's not my recollection of the testimony.

THE COURT: Well, how is it related in any way to the direct examination?

MR. GOODMAN: I think the question was asked and answered in that manner on direct, your Honor. That's why I'm questioning him on cross.

THE COURT: Nothing was raised as a matter of fact. If I remember I called it to your attention.

MR. GOODMAN: No, sir, I'm talking about just a few minutes ago before the recess. One of the questions that I think he answered was to the effect that he couldn't remember ever losing a document in his office. I want to explore that on cross-examination.

THE COURT: You mean when Mr. Wright was recalled here this morning he has since been asked this?

MR. GOODMAN: Yes, your Honor, this morning.

MR. SHAW: My memory is that's not the answer he gave but perhaps Counsel could ask him for his memory as to what he said.

THE COURT: I'm asking do you remember asking the question?

MR. SHAW: The question that I asked to my memory is whether he has a memory of having lost any tax related documents of Judge Claiborne.

MR. JOHNSTON: If we can't resolve it, your Honor, I suppose he --

THE COURT: Let's confine it to Judge Claiborne.

BY MR. JOHNSTON:

Q Do you have any recollection of ever losing or mislaying any tax documents relative to Judge Claiborne?

A No, sir.

Q It's your testimony that no document relating to Judge Claiborne's tax matters was ever lost or mislaid in your office?

A Not to my knowledge.

Q Isn't it a fact that on a number of occasions you phoned Judge Claiborne's office and asked him to send down a set of copies of things that he had previously provided to your office?

A Not to my recollection.

Q That never happened?

A Not to my recollection, not to my knowledge.

Q Mr. Wright, did you have a serious illness after the dates that we're talking about here and before the present time?

A August 31 of '78 I was fine --

Q No, sir, I'm asking since that time, since 1980 when you prepared the '79 return, have you suffered a serious illness?

A Yes, sir.

Q What was the nature of the illness?

A I had the middle right lobe of my lung removed for cancer and later therapy that was much worse than the original surgery.

Q What was the affect of the therapy?

A Radiation pneumonitis which a form of pneumonia that damaged the lung lining, affects your breathing. I had a cough continually, running of a fever and that type of thing. I had to go back into the hospital for twice as long as I was in there for my operation.

Q Do you still suffer from the effects of that?

A I have 80 percent lung capacity. I function fine as long as I stay at my desk but I can't run a foot race.

Q Are you presently taking medication because of that?

A Yes.

Q Would it be a fair statement, Mr. Wright, that that illness and the subsequent therapy and its results may have affected your memory of events that occurred back in 1979 and 1980?

A I have no way of knowing that.

Q You can't say whether your memory was affected or not?

A No.

Q All right, sir. You testified I think that there was no record in your log of Judy Ahlstrom coming in and leaving anything in your office on April 11; is that right?

A Yes.

Q Would you look at that page again, please? If a client or someone bringing a record on behalf of a client came into your office and simply left it with your secretary or with someone else in the outer office, you wouldn't record it in your log book, would you?

A Probably not. I wouldn't have any time on it unless I spent --

Q What?

A Not related to their actually being there, no.

Q So the fact that your book doesn't show that Judy Ahlstrom came in and left a letter and some documents on April 11th doesn't in any way prove that that didn't happen, does it?

A No.

Q You do have an entry for Judge Claiborne on April 11th. What is that entry?

A "Harry Claiborne, estimate to pay on extention and so forth and he was in later, one and a half hours".

Q That's the date on which you worked up the calculation on what his estimated income was going to be; is that right?

A No.

Q No? I want to show you an exhibit, Mr. Wright, which may have help to refresh your memory, if I can find the right one. Government's exhibit 30, I think. Do you have Government's exhibit 30 at the witness stand, Mr. Wright?

A No.

Q Here it is. I want to show you this exhibit, Mr. Wright.

MR. JOHNSTON: Could I stand here just so I can -- there's several different documents here, your Honor.

THE COURT: All right.

BY MR. JOHNSTON:

Q Included in this exhibit is a work sheet, is it?

A Yes.

Q And you testified about that earlier in this trial?

A Yes.

Q Wasn't that work sheet worked up on April 11th?

A No.

Q On the 10th, perhaps?
A No.
Q What's the basis for your testimony about that?
A My log.
Q Well, the log has a reference to the estimate, doesn't it, on that date? Doesn't it say Harry Claiborne, estimate April 11th, Friday?
A Yes.
Q Isn't that the work sheet that you worked on when you were working on the estimate?
A No.
Q What does the log entry indicate to you that you were doing on April 11th for Harry Claiborne?
A Preparing extension which is form 4868 and estimate for the subsequent year, 1980.
Q But the work sheet that I've just shown you is the basis for the estimate, isn't it?
A Yes.
Q Wasn't it done the same day?
A No.
Q Do you know when it was done?
A On the 8th.

THE COURT: April 8th?

THE WITNESS: Yes, sir. The note at 10:00 o'clock there.

BY MR. JOHNSTON:

Q Would you read that?

A "Worked on Harry Claiborne's data and talked to Judy, the secretary, and got the W-2 data from her and figured approximate tax".

Q That's the day, then, on the 8th when you did the work sheet?

A That is right, sir.

Q And then did you prepare the estimate itself on the 11tn?

A My secretary did, yes.

Q Your secretary did?

A Yes.

Q You've logged an hour and a half on April 11th. Can you tell us what you were doing for an hour and a half?

A No.

Q Would you have any record of what you may have been doing on April 11th for Harry Claiborne other than the entry in the log and this exhibit that I've just shown you?

A Not particularly.

Q The estimate is dated April 11th, isn't it?

A Yes.

Q And that, the application for an extension of time to file, is dated April 11th, isn't it?

A That's right.

Q That's one of the documents in that exhibit, is it not?

A That's right.

Q Now on that day you received from Harry Claiborne a check for $8,000 payable for the Internal Revenue Service, did you not?

A Yes.

Q You also received from him his form W-2, did you not?

A I don't know when I got that document.

Q You needed the document in order to do this work on the extension, did you not?

A No.

Q You didn't?

A No.

Q Why not?

A You just need the information from it.

Q And you already had the information?

A From Judy, yes.

Q Isn't it a fact that on that day you also prepared his declaration of estimated tax for the following year?

A Yes.

Q And he gave you a check or somehow a check got to you for $2500, didn't it?

A Yes.

Q Do you know how you got the check for $2500 and the check for $8,000 and the W-2 if you did get it?

A No.

Q You have no knowledge of that at all?

A Not specifically.

Q If Judy Ahlstrom had come into your office with a letter from Harry Claiborne on that day along with the W-2 and a check for $2500 and simply left them with your wife, your secretary or somebody else outside, you wouldn't necessarily have known that she was there, would you?

A No.

Q But you did have those documents on April 11th, didn't you?

A I can't say that I did.

Q Well, the application for extension was dated the 11th?

A I had the checks.

Q Was it mailed on the 11th?

A Yes.

Q And along with it you sent a check for $8,000, did you not?

A I don't have any recollection of mailing this application for extension, the actual mailing of it.

Q Do you have any way of telling now when it was mailed?

A No.

Q Would it be your normal practice to mail it promptly after it was prepared and signed?

A If everything is in our possession, yes, like the check, we prepare this and wait for a check. This indicates that I would have mailed this probably on the 11th or the next day or so.

Q There wouldn't be any reason to delay mailing it?

A No, and we like to get these things out of the office, yes.

Q Now do I understand that you spent time every month going over Judge Claiborne's bank statements and the other records that you obtained from his office?

A Not particularly. My secretary did that and handled most of at least the initial questions. She would make up a list of questions that she had.

Q Did you spend any time yourself on those records?

A Not very much. My time would be spent after the end of the year or if I had specific questions each month I might have to follow through on them if she did not get the answers that she needed or that we needed to continue our work.

Q Would you refer in your log, please, to June 15 which is a Sunday. You have an entry there that is 2:00 o'clock. Would you read that, please?

A "Worked on Harry Claiborne's tax return, three hours".

Q And then there's some more there that relates to him; is that right?

A Yes, and tried to reach Judy and get Harry's phone number.

Q Does that indicate that you were unsuccessful in reaching either Judy or Harry Claiborne?

A That indicates to me I did not reach her.

Q But you spent three hours working on his 1979 return on the 19th; is that right?

A That's true.

Q Would you turn to the next page, please the 16th? And you have an entry first opposite 11:15. Would you read that, please?

A "Called Harry Claiborne, re, more information and worked on his return", and then I have a note down below.

Q Excuse me just a moment. We'll come to that. But you were still working on his return, were you, on the 16th?

A There was still something I needed to finish that return, yes.

Q But the note indicates that you worked on his return, right?

A Yes.

Q So that was what you were doing?

A That's what I was doing.

Q Now the note below is indicated with an arrow and down at the bottom there's a note?

A That's right. It says, "Harry Claiborne's return and he was in later". Total time for the day was two hours and three-quarters, two and three-quarters.

Q Would you begin reading one line above where you stated, please, Mr. Wright, "worked on"? You started reading "Harry

Claiborne". There's a line above that and it appears to be relevant.

A Yes. Excuse me.

Q Would you read the whole thing again?

A "Worked on and called on Harry Claiborne's return and he was in later".

Q So you recorded two and three-quarters hours that day; is that right?

A That's true.

Q Can you tell me where in the day or what part of the day you spent two and three-quarters hours on these matters on June 16th?

A My time entries or if I can approximate the time I start or finish, but does not relate specifically and sometimes I have to make notes as I did in this case at some, on some other part of the page and I may have worked later and even later, say, than this 1:45, I would have worked on his return and simply put it back over here as a convenient place to add something to the original note.

Q Well, when did you spend two and three-quarters hours, what time of the day did you devote two and three-quarters hours to Harry Claiborne's return?

A I can't answer that.

Q Well, isn't it a fact you have time logged for another client at 9:00 o'clock, half hour?

A Yes.

Q At 9:45 you got something else logged for something else?

A Right.

Q At 10:00 o'clock you got a telephone call, apparently; is that right?

A Yes.

Q 10:30 you've got something else logged?

A Yes.

Q That runs over past 10:45 apparently; is that right?

A Yes.

Q Now at 11:15 you've got the entry, "Called Harry Claiborne, re, more info and worked on his return", and that entry where it's placed on the log goes down through or perhaps past 11:45, doesn't it?

A Yes.

Q That would account for your time pretty well up until 12:00 o'clock, wouldn't it?

A Well, I have no specific entry that I can see here as to the time that it's taken before I worked on Harry's except the half hour noted at 9:00 o'clock. I have no other time. I don't have any way of knowing exactly how much time I spent on these other clients or --

Q Well, look at the 9:45 entry. Doesn't that show that someone was in for some fraction of an hour?

A Oh, excuse me, yes, it does, a quarter hour.

Q Doesn't the 10:00 o'clock entry indicate a telephone call?

A I don't see any specific time there.

Q Well, it's opposite 10:00 o'clock, isn't it? You haven't recorded a total number of hours, is that what you mean?

A Yes.

Q But there again this day is a day where it is hard to write all the items that have been worked on.

A If we totaled up the total time on this day I don't know what it would total at this time. With a deadline like this I'm subject to work ten to 12 hours in that day.

Q Yes, sir. But if you work two and three-quarters hours on Harry Claiborne's return on the 16th of June, 1980, why isn't that time recorded opposite the hours of the day where you normally recorded work that you did in your diary?

A There isn't enough room at any one point there to do this and these other items are done in between. When I'm working on something I may make a phone call, I may receive a phone call and you may not work straight through on any one item.

Q Isn't it a fact, Mr. Wright, that the notation at the bottom, "Worked on Harry Claiborne's return and he was in later, two and three-quarters hours", was added after you had completed your entries on this page?

A Yes.

Q At some later time?

A Well, probably that day, later that day.

Q You think it was added that day?

A The indication to me is I'm making this on that day. I said he was in later indicating I made this sometime after he was in.

Q Do you have any present recollection of when you made that entry at the bottom of the page?

A No.

Q Now on Sunday, the 16th you were still working on the return; is that right?

A That's true.

Q And you finished it up that day, I take it?

A Yes.

Q And it was mailed that evening perhaps?

A Yes.

Q And it was stamped in by the Internal Revenue Service on the following day; is that correct?

A On that day.

Q On the 17th. Do you have the return there?

A No.

Q That's Government's 3, I believe.

A The envelope we saw the little earlier was the 16th so I assume the Service had to get it later than that.

Q Let me show you a return which is in evidence as Government's exhibit number 3 and ask you when that was stamped in by the IRS?

A September 17th, 1980 --

MR. GOODMAN: September?

BY MR. JOHNSTON:

Q There's another stamp lower on the return?

A Oh, excuse me, June 17th, 1980.

Q June 17th was stamped in where, can you tell?

A I can read Utah so I assume it's going to be Ogden, Utah. I can't really read it, though.

Q So isn't it pretty clear you mailed it on the 16th and through some miracle it arrived in Ogden on the 17th?

A Yes.

Q Now when Harry Claiborne signed that return he did it the 15th, didn't he?

A He wrote the date the 15th but I'm assuming he signed it on the 16th when he was in later there.

Q Mr. Wright, do you remember the testimony that you gave earlier in this trial?

A Like what?

Q Well, let me read it to you, if I may, from a portion of the transcript which we now have your testimony of a few days ago. I'm looking at page 177 of the transcript. I'm asking the questions and you're answering them at line 13.

"Q. Now you provided the tax return.
Isn't it a fact that the Judge had
already signed a form in blank for you

for that year?

A. I think he dropped off the signed return possibly back in April.

Q. For 1979?

A. Yes. Whether we used it or not is the question."

Q Do you recall giving that testimony?

A Yes.

Q Do you recall testifying at the previous trial of this case, Mr. Wright?

A Yes.

Q You remember that you testified, I take it?

A Yes.

Q Don't you remember that at that trial also you acknowledged that you thought probably that return was signed in blank by Judge Claiborne?

MR. SHAW: Objection, your Honor. If he's going to read him a page reference, read it.

MR. JOHNSTON: Well, if I can find it, I will do so. May I have a moment, your Honor?

THE COURT: Yes. I may say, ladies and gentlemen of the jury, while counsel gets these transcripts prepared I don't get a copy so if I appear ignorant sometimes when I say I don't remember what a witness said, don't be surprised. They don't give them to me.

MR. JOHNSTON: Your Honor, in order to save time, if I may, I'll pass that question until we get the transcript. We don't have it here in a form that we can use it from the prior trial.

THE COURT: All right.

BY MR. JOHNSTON:

Q Mr. Wright, do you recall that Mr. Raggio and I met with you in your office about a week before the first trial of this case?

A Yes.

Q And do you remember that we asked you at that time whether the return had been signed in blank?

A I believe we discussed it.

Q And isn't it a fact that you acknowledged to us that you thought it was signed in blank?

A I might have, yes.

Q And don't you remember also that you expressed some concern at that time that the IRS might somehow try to gather up a lot of returns that you'd prepared and see whether they were signed in blank?

A I can't recall that.

Q You don't remember being concerned about that?

A No.

Q Mr. Wright, is it proper for an accountant to file a return that's been signed in blank and not reviewed by the taxpayer?

A No.

Q You would have some embarrassment about doing that?

A Yes.

Q Do you feel some embarrassment about that?

A No. I don't think it was signed in blank, the one that we sent in.

Q When did you decide that it was not signed blank?

A When I was reviewing my log book.

Q Well, is this during the seven hours plus that you spent with representatives of the Government preparing this morning?

A Yes.

Q They went over that with you?

A Yes.

Q Did they persuade you that the return was not signed in blank?

A No. I determined myself that I do not believe this return was signed in blank.

Q Were they questioning whether it had been signed in blank?

A I don't think so. At the time -- well, let's see. I suppose they were. We must have been talking like that at that time.

Q You certainly talked about that, didn't you?

A Yes.

Q And they were suggesting that you were perhaps mistaken when you testified that you thought it was signed in blank?

A No. When I noticed my notes which I had not reviewed when I talked to you earlier nor anyone else until just recently when I -- after, in fact, I had my partner send you the copy of August 31 and that's why it's different than the one I brought up because my partner did that.

Q But that doesn't have anything to do with the time when the return was signed, does it?

A No, but that has to do with my referring to my notes on my daily log. The fact that Mr. Claiborne had a refund coming and he was in later indicates to me he came in to sign his return. There would be no other reason for him to come in. I could have mailed the return.

Q Let me be sure I'm understanding you. Are you suggesting that there's something on the log record for August 31, 1978 --

A No, no, this is Monday, June, isn't it, 1980?

Q So the August 31 sheet doesn't help us on this, does it?

A No.

Q Now, Mr. Wright, could we have the easel again please? May I have Government's 28, please, if we don't already have it? Here it is.

Mr. Wright, I'm going to hand you Government's exhibit 28 which is an undated letter to you from Judge Claiborne and ask you to look at that. You do recognize that, do you not?

A Yes, I do.

Q Down in the lower right-hand side here there's a bunch of notations that you made, aren't there?

A Yes.

Q And those are the notations that you made when you were analyzing these bank deposits to try to determine which ones actually represented fees, is that right?

MR. SHAW: Objection, your Honor. We've been over it and it's beyond the scope.

MR. JOHNSTON: I'm going for foundation for another question, your Honor.

THE COURT: All right. I've heard him testify several times about this matter.

MR. JOHNSTON: I think my purpose will become clear in a moment, your Honor.

THE COURT: All right.

BY MR. JOHNSTON:

Q And it was your testimony, I think, Mr. Wright that all of this information that you've recorded here was developed in conversations with Judge Claiborne; is that right?

A Yes. I had to analyze the deposits. I didn't have anything to show me what the detail of that deposit was.

Q Do you have any present recollection as to whether those conversations were in person or on telephone?

A No, I don't.

Q Will you look at your log book and show me any single entry of a telephone conversation or a meeting with Judge Claiborne where these things were discussed and determined?

A I don't see one there.

Q There isn't any, is there?

A Not to my knoweldge.

Q All right, Mr. Wright. You've testified that if there's no entry in the book that means that an event didn't happen; is that right?

A No. That means in the normal course of my business I write something down, but I could have --

Q Do you fail to write things down sometimes?

A I sure do.

Q My understanding of your testimony on direct examination was that you always methodically regularly made a record of time that you spent working for a client. Now am I incorrect in that?

A That's my normal business routine.

Q But you don't always do it?

A That's right.

Q So there may be gaps in your diary?

A That is right.

Q Or there may be things that happened that aren't recorded in the diary; is that a fair statement?

A That's true.

Q And you may have had a conversation with Judge Claiborne that didn't get recorded in the diary?

A That's possible.

Q That could relate as well as to matters other than these items that attempt to analyze the bank deposits, couldn't it?

A Could be.

Q Any matter?

A Any matter, uh-huh.

Q So the fact that a meeting or a conversation or a telephone call is not noted in the diary doesn't prove that it didn't happen, does it?

A Does not prove that.

Q Now, Mr. Wright, however you did it these are your notations, aren't they?

A That is my writing, yes.

Q And you reached a conclusion as to which of these deposits that the Judge had listed actually represented fees, didn't you?

A No.

MR. SHAW: Objection.

THE COURT: Aren't we now repeating?

MR. JOHNSTON: Again, your Honor, I'm laying a foundation.

BY MR. JOHNSTON:

Q You've totaled up some four items, did you not, that you decided or somebody decided did not represent or did represent fees?

A Mr. Claiborne told me which of the four items, what the four items were and I told him --

Q But you have no notation in your diary to indicate when he told you that, do you?

A No.

Q Do you have any present recollection, any real present recollection of his telling you these things?

MR. SHAW: Objection.

THE COURT: I'll permit it.

THE WITNESS: Not specifically.

BY MR. JOHNSTON:

Q All right, sir. You do recall that you totaled the four items, don't you?

A Yes.

Q And you had an adding machine tape I think that shows the total?

A Yes.

Q And isn't it a fact that you gave that total to Judge Claiborne?

A I do not recall that.

Q Do you know of any other way he could have had that total other than by receiving it from you?

A He's the one that told me what they were in the first place.

Q Don't you recall, Mr. Wright, that you previously testified that you gave the total number to Judge Claiborne?

A No, I don't.

MR. SHAW: Objection, your Honor, he didn't say that and he has the transcript.

THE COURT: Objection sustained. This is new material.

BY MR. JOHNSTON:

Q Mr. Wright, I'm going to read to you from the transcript of your testimony earlier in this trial beginning at page 177, perhaps I should back up, beginning at page 177 and I'll say to you that we were talking at that time, I was asking you questions about the total of the $22,000 figure that appeared on the list of numbers in Judge Claiborne's handwriting. I'll show you the blow-up which is identified and in evidence as Government's exhibit 31-A. You recall this document?

A Yes, I do.

Q Do you recall testifying specifically about the $22,000 figure?

A Not specifically.

Q Well, let me give you the primary exhibit, 31. Those numbers are in Judge Claiborne's writing, aren't they?

A Most of them.

Q Let me read to you from the transcript and I'll represent to you that this is what I was asking you about. Page 177, line 21.

"Q. The figure of $22,332.87 is
written in judge Claiborne's handwriting,
isn't it?"

A Yes.

Q I'll just read the transcript, Mr. Wright. That was the question.

"A. Yes, it is.
Q. He had to get that figure from you,
did he not?
A. That's right.
Q. He didn't have it himself?
A. No."

Q Do you recall being asked those questions and making those answers?

A I believe I do, sir.

Q Do you wish to explain them in someway now?

A Yes. I simply related to an item that I had knowledge of myself and said that I gave it to him and I don't believe that's so at this time.

Q Do you want to correct your testimony or change it at this time?

A I would say I don't recall giving him this figure and he already had the figure.

Q Well, Mr. Wright, there are a great many things that you've been questioned about that you don't specifically recall, aren't there?

A That is right.

Q But you've had no hesitation, have you, on other questions put to you by the Government in testifying if things happened, that statements were made, that phone calls were made or you didn't really specifically recall the event; is that a fair statement?

A That could be.

Q Doesn't the fact that this exhibit that I had on the stand here that you were looking at has notations in your handwriting that you totaled the four items on your own adding machine, you arrived at the total, doesn't that indicate to you that you must have given that total to Judge Claiborne?

MR. SHAW: Objection.

THE COURT: We certainly have been over this a dozen times.

MR. JOHNSTON: I'm not getting very satisfactory answers to the questions, your Honor.

THE COURT: Well, they may not be satisfactory to you but the gentleman says he has no present recollection. He's got to work from documents the same way the jury has to work from documents.

BY MR. JOHNSTON:

Q Will you look again at your diary, Mr. Wright, for August 31. There's an entry at 3:30 p.m. Would you read that, please?

A "Took Harry Claiborne envelope to Ginny, half hour".

Q What was in the envelope?

A I don't know.

Q Isn't it a fact that what you took to Ginny, and that's Ginny McElwain, is it not? And what you took to her in the envelope was a copy of Judge Claiborne's tax bill for the year 1977.

A I don't recall what was in the envelope.

Q Do you recall some conversation with Judge Claiborne on that day as to the amount of taxes that he still owed for 1977?

A I don't have any recollection of that, sir.

Q You don't recall that subject being discussed at all?

A According to my note I didn't talk to Mr. Claiborne and a half hour isn't enough time for me to leave my office and give Ginny an envelope and get back and also talk to Judge Claiborne.

Q That was the last day that the Judge was in private practice for a full day, wasn't it?

A That's my understanding.

Q And you knew that the following day he was to be sworn in as a Judge, didn't you?

A I don't have any present recollection of knowing actually when he was taking the bench.

Q You don't recall talking with him at least briefly and wishing him well and suggesting that he have may have been making a mistake?

A No, not really.

Q Oh any date?

A I don't recall.

Q Would you look at the entry for May 2, please? You have an entry there of 11:00 a.m.; is that right?

A Yes.

Q Will you read it?

A "Called Judy at Harry Claiborne's office, half hour".

Q Now does that entry indicate a note that you placed there in advance to remind you to do it or is it a record that you did it?

A Both.

Q It's both?

A Yes.

Q Why did you, if you know, why did you make a notation in advance that you wanted to call Judy on May the 2nd?

A I don't know.

Q Do you have any recollection of that?

A No.

Q Do you remember calling her?

A No, not specifically.

Q Do you have any recollection of what the conversation was?

A No.

Q Would it be your present testimony that you talked to her on the phone for a half an hour at that time?

A No. I may have done other things. If I got something from her, in all probability I would have gotten his file out, I'd have to have something in front of me, I'd have to do something with the information I got from her. I'm not going to talk to her for half an hour without doing something, I assume. I have no specific recollection of that conversation.

THE COURT: Yes, I have a clear recollection of this coming up previously.

MR. JOHNSTON: I'm just about through, your Honor. Could I have just a moment?

BY MR. JOHNSTON:

Q Mr. Wright, will you look at your diary again? I've forgotten the exhibit number that was given to that. Could you help me?

A 48.

Q Do you have before you Government's exhibit 48?

A Yes.

Q Is it your testimony that that exhibit contains all the pages in the diary between the first date that's shown and the last date that's shown that relates in any way to services performed for Judge Claiborne?

A   Yes.

Q   This is everything between those two dates that has to do with Judge Claiborne; is that right?

A   I made a cursory look through my diary. I have not had a secretary to do that. I did that as briefly as I could covering the periods of time but there could be entries I suppose in other periods of time that would relate to him.

Q   You made only a cursory review of it?

A   A detailed review of certain times but I did not go through 365 days a year for three years. We would have to transcribe every item on these documents to make sure that we don't miss something of Harry Claiborne's.

Q   But if I understand you correctly you're saying that you now cannot assure us that there are not some other pages also that have entries related to Judge Claiborne?

A   That's right.

THE COURT: Do you wish for me to go through it and examine it in camera? The original document is here. I'll go through it.

MR. JOHNSTON: Your Honor, I'd be quite happy to ask Mr. Wright to do that during the noon recess so he can give us some assurance whether he has everything or not.

THE WITNESS: I won't be able to do it during noon recess.

BY MR. JOHNSTON:

Q Have you gone through that diary with any of the Government people?

A No.

Q Have they looked at it?

A No.

Q You did it all by yourself?

A Yes.

Q And they haven't seen anything other than what you copied?

A Yes.

MR. JOHNSTON: I don't wish to impose that burden on the Court. If he says he can't do it during the noon recess, I don't really understand why he can't, that's going to be pretty tedious.

THE WITNESS: You're asking me to go through 1978, 1980 and possibly '81?

MR. JOHNSTON: Well, perhaps that's the best we can do at the present time.

MR. GOODMAN: We'd be happy to assume that burden of going through the diary.

THE COURT: You're not entitled to see the client's name, I am.

MR. JOHNSTON: Fine. I would ask the Court to review it, if Mr. Wright can't.

THE COURT: All right, I'll do it.

MR. JOHNSTON: I have no further questions.

THE COURT: Any redirect, if it's short?

MR. SHAW: Yes, your Honor. I think we can complete it in five minutes.

REDIRECT EXAMINATION

BY MR. SHAW:

Q As you you said, you recall having testified on August 2nd and 3rd. Do you recall giving this answer to this question on page 63,

"Q. Could you tell us what the total
1979 legal fee income was that was
reported in the 1979 tax return?
A. 22,332.87.
Q. Where did you get that figure?
A. From Judge Claiborne?"

Q Did you give those answers to those questions?

A Yes.

Q You also said you recalled having testified in March of this year. Directing counsel's attention to page 343. Do you recall giving this answer to this question,

"Q. By the way, Mr. Wright, do you know
whether that income tax return was
presigned by Judge Claiborne in blank?
A. It does not appear to be, no."

Q Did you give that answer?

A Yes, I believe so.

Q And that is your testimony today, is it not?

A Yes.

BY MR. JOHNSTON:

Q Mr. Wright, is there any way you can tell --

MR. SHAW: Excuse me.

MR. JOHNSTON: I'm sorry, I thought you were through. I apologize.

BY MR. SHAW:

Q Mr. Wright, you stated that you made a cursory review of all of the years that you dealt with Judge Claiborne or Mr. Claiborne; is that right?

A Not at all of the year.

Q Did you make a cursory or detailed reviewed of the time period between August 31, 1978 and the June 18, 1980?

A I don't think I looked at every page, no. I could not make that statement at this time, no.

Q You have testified that you've talked to some agents and the IRS and also attorneys in this case; is that right?

A Yes.

Q Did any of the agents or I or any of the attorneys ever suggest to you in any way or not that you should testify truthfully?

A Yes.

Q We've told you to testify truthfully, haven't we?

A Yes.

Q Did we ever suggest to you to make a false statement of any kind?

A No.

Q You haven't looked at these, other than the August 31st, 1978 entry, you have not looked at these logs prior to your testimony last week; is that right?

A That's right. Not directed to the case. I may have looked at the log, you understand.

Q Well, for what other purposes would you look at the log?

A I may have wanted to know what I did for a client and when.

Q In other words, you may have looked at the log before that with respect to other clients for other purposes?

A Yes, that is right.

Q You've testified that you're on some sort of medication for your illness?

A Yes.

Q Does that medication affect your memory in any way?

A No, not to my knowledge.

Q Now the entries on -- first of all let me ask this question: The entries that you make in your daily logs are generally listed on the logs next to times of the day; is that correct?

A Approximately.

Q Was it your intent when writing these entries to have a date relating to an exact time of day?

A Just generally, if I had room I would put it on the exact time. If I didn't it would just have to subsequently follow something else.

Q So if you didn't have any more room left on the page across from something you did at 10:00 o'clock you might put it across from 5:00 o'clock and it doesn't mean it happened at 5:00 o'clock?

MR. JOHNSTON: Objected to as leading.

THE COURT: It is leading.

BY MR. SHAW:

Q Could you tell us when your illness began, the approximate date that you were first aware of your illness?

A Not specifically. I went into the hospital for the operation on September 13th, I think.

Q Of what year?

A '82.

MR. SHAW: Court's indulgence, please? Nothing further, thank you.

THE COURT: Well, I'm going to excuse the jury at this time for lunch.

Mr. Wright, will you trust me with your books that pertain to August, from August of 1978 through June of 1980?

THE WITNESS: Yes, sir.

THE COURT: You're at liberty -- I don't eat any lunch because I don't need any lunch.

THE WITNESS: I don't either, your Honor.

THE COURT: But you are at liberty to sit in my office with me while I examine the books if that's your desire. But it's not necessary.

THE WITNESS: Okay. Who else will be in your chambers with you?

THE COURT: Probably my law clerk.

THE WITNESS: I would say it's all right if you will be not divulge my other client information. That's my only concern, your Honor.

THE COURT: Oh, of course not, I have no intention, I wouldn't know whether they are clients of yours except from your entries, of course, but I have no intention of divulging that.

THE WITNESS: I don't know what you mean by camera. Does that mean you're taking a picture?

THE COURT: That means I examine it with no lawyers present, except my law clerk. He is a lawyer, he's in there too. He doesn't eat any lunch either.

THE WITNESS: You're not going to be --

THE COURT: I'm not going to record anything except what may show with respect to Judge Claiborne.

THE WITNESS: All right, sir.

THE COURT: Nothing will be revealed from this exhibit that is unrelated.

THE WITNESS: All right, you're at liberty to go through my diary, then, sir.

THE COURT: All right, members of the jury, you may be excused until 1:30.

That would require, I suppose, the 1980, 1981 -- no, I beg your pardon. '78, '79 and '80 books

Court will be in recess until 1:30.

(The luncheon recess was taken.)

RENO, NEVADA, WEDNESDAY, AUGUST 8, 1984, 1:30 P.M.

-oOo-

(The proceedings continued in the
absence of the jury.)

THE COURT: As Mr. Wright anticipated, it has taken more time than the luncheon recess to review his docket books. I will say to you that I took the year 1979, my law clerk took the year 1978 beginning August 31st, 1978 beginning August 1st, 1978 and he has now covered all of the two months for the year 1980, with the understanding he would stop on June the 30th, 1980 to and including that date.

Here are two entries that he picked up, September 16th, 1978, which was the Saturday, 11:00 a.m. The log book shows "Called Harry Claiborne several times and talked to Jimmy Brown, one hour". Also my law clerk picked up on Sunday, April 6th, 1980 at 4:45 p.m., "Reviewed Harry Claiborne alimony with Carl and received his divorce agreement, three-quarters of an hour". If you would like to see the law clerk's notes on it, fine.

Now I have in '79 the following notations and I'm not certain whether any of these were included, gentlemen. You'd to have check them with the exhibit that's in evidence. They may be duplications but I doubt it. Friday, January 12, 1979, 4:00 p.m., "Took records to Harry Claiborne at federal building, one half hour".

Saturday, January 27, 1979 at 5:00 p.m., "Harry Claiborne, called re, a friend, one half hour".

"Tuesday, January 30, 1979 at 2:00 p.m., "Called Harry Claiborne 385-6432", no time shown as charged on that entry.

Friday, March 9, 1979 at 1:15 p.m., NIC audit, Harry Claiborne and better living, three-quarters of an hour each charged".

Friday, April 13, 1979 at 2:00 p.m., "Called Claiborne, one hour". Saturday, June 2, 1979 at 2:00 p.m., "Worked on Harry Claiborne and called him. He was just leaving for airport and will call Tuesday, two hours".

Friday June 8th, 1979 at 3:00 p.m. called, and it looks like the word secretary Carson, C-a-r-s-o-n. Beyond that is one-quarter hour and then underneath that is "Claiborne, no answer".

Saturday, June 9, 1979 at 3:00 p.m., "Reviewed data and called Harry Claiborne. No answer, three-quarters of an hour".

Sunday, June 10, 1979 at 11:00 a.m., "Called Harry Claiborne, will be in Tuesday, three-quarters of an hour". Friday, June 15, 1979, 11:45 a.m., "Harry Claiborne, worked on data during the day but finally got extension. One and three-quarters hours". I have completed the 1979 review of the log book through July 31st of 1979.

I have asked my law clerk to continue reviewing it for such other entries, if any, that were made. I will be glad to hand this two page sheet as well to the clerk and you gentlemen may examine it. I copied mine verbatim and I assume that my law clerk did likewise.

I have not checked my law clerk nor has he checked me. However, I am of the opinion that we're accurate in our review. Now as to Mr. Raggio's, note I have here, "Mr. Wright's log on June 16", and that must be 1980, "Does entry of 1:30-1:45 appear to be in different pen or pencil than other entries?" question mark.

I can only say that I am not a handwriting expert or an ink expert. It does appear to me to be in the same pen but if you wish to ask Mr. Wright, why, of course, there is no book that will be handed to me and he can express his opinion. I can't say to you gentlemen. I'm not expert on the subject.

MR. JOHNSTON: Your Honor, would it be possible for most of the rest of the page on June 16, 1980 to be covered up so that we don't see it and we have no interest in Mr. Wright's other clients but so that we ourselves might compare the last three lines there with some of the material that appears above it?

THE COURT: Let's see the 1980 book, isn't it?

MR. JOHNSTON: June 16, 1980, your Honor. That was the subject of Mr. Raggio's note.

THE COURT: It was so clear to me.

MR. JOHNSTON: The reason for the question Judge is that it looks different on the copy that we have. We wouldn't raise the question otherwise.

THE COURT: Mr. Wright, look at this. There are only two names, the rest of it I can cover with my hand and I do not wish to reveal anything that is confidential.

THE WITNESS: Well, the first word, the first name is only a first name. I don't think that would be pertinent at all. The one name only. I think I don't object to them seeing that.

THE COURT: Do we have a piece of masking tape or something that I could put over it now and then remove it? You can even see through the masking tape and it may tear the page.

Gentlemen, there comes a limit to what a Court may do sometimes. You asked me for my opinion and I've given it to you. I will have this page photographed. That's the best I can do.

MR. JOHNSTON: We already have a photograph.

THE COURT: Well, I understand that. But anybody with any common sense could take a look at it. But apparently you don't trust anybody with common sense, Mr. Johnston.

MR. JOHNSTON: That's not my feeling at all, your Honor, and I'm sorry if I gave that impression.

THE COURT: You may question Mr. Wright about it and ask his opinion if it's in the same writing, but I can't delete this book and perhaps mutilate the book by putting masking tape on it. I notice that the first word that I put the masking tape on, it is still of course readable, but I immediately removed it because you can see through the masking tape.

MR. JOHNSTON: Your Honor, under these circumstances we won't pursue the matter any further. Thank you very much.

THE COURT: All right. My law clerk is continuing with the other exhibits. Now what do you wish to do with respect to the entries we have found to date that were apparently not -- I don't know that they were included in the exhibit 48 or not.

MR. JOHNSTON: What we'd like to do, your Honor, is to have copies, if we could, of your notes and your law clerk's notes and then perhaps the original notes be added to the exhibit.

THE COURT: You can take my notes right there. They are readable.

MR. JOHNSTON: Thank you, your Honor.

THE COURT: All right, call the jury.

MR. GOODMAN: Play I inquire whether Mr. Wright is now on redirect or recross? Sometime has elapsed and I've forgotten.

THE COURT: I've frankly forgotten. I thought he was still on cross, if you care to pursue further this particular matter. He's on redirect but if you care to pursue further the inquiries that were made earlier, I would permit it.

All jurors are present. All right. Is it your wish that the redirect continue with the right reserved to interrogate further with respect to these items that I've called to your attention?

MR. JOHNSTON: Yes, your Honor.

MR. SHAW: I believe I had concluded at the time of the lunch recess, your Honor.

MR. JOHNSTON: I have no further questions for Mr. Wright, your Honor.

THE COURT: I take it you wish him to remain because there may be other entries found because we did not finish our examination of these log books? I take it he had better remain.

THE WITNESS: Your honor, I'd like to --

MR. JOHNSTON: We don't have any wish to impose further on Mr. Wright's time and as far as we're concerned he can be excused.

THE COURT: All right. The log books then may be returned to Mr. Wright and he may be excused. Members of the jury, during the luncheon recess my law clerk and I went over the log books. We had not finished but we found some entries that did refer to Judge Claiborne but these have been provided to counsel and counsel have no desire to pursue it further. Is that satisfactory, gentlemen?

MR. SHAW: Yes.

MR. GOODMAN: Yes.

THE COURT: All right, thank you, Mr. Wright. The log books may be returned, the three years in question, 1978, 1979 and 1980.

MR. SHAW: Your Honor, that would be the Government's rebuttal case.

THE COURT: All right. Is there any surrebuttal?

MR. GOODMAN: There is one question of Judge Claiborne, please.

THE COURT: Judge Claiborne has been previously sworn and he remains under oath.

HARRY EUGENE CLAIBORNE, DEFENDANT SURREBUTTAL, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Judge Claiborne, did you meet with Jay Wright in his office on June 16th, 1980?

A No.

MR. GOODMAN: Nothing further.

MR. HENDRICKS: No cross.

MR. GOODMAN: The Defense rests.

THE COURT: Nothing further from the Government, then?

MR. SHAW: That's correct, your Honor.

THE COURT: Well, members of the jury, the law requires that I go over with counsel the charge that I anticipate giving to you after the argument of counsel. This takes a bit of time. Further I might add that I do not like to break an argument, a final argument, let one side open and the other side answer and break that perhaps in the middle, so I have in mind that the most orderly procedure because of the fact that it may take as much as two hours for me to go over this charge with the lawyers, is to excuse you at this time and bring you back here tomorrow morning. Then we will start with the final arguments.

I am allowing one and a half hours per side. The Government has the right to make the first of the opening arguments and must make a full and complete statement of the case at that time. The Defense then argues and then the remaining time, the Government has the right to make any reply to the Defendant's arguments. That would be a total, of course, of three hours of arguments. My thought is that we will come pretty close tomorrow to getting in those three hours of arguments and I suggest to the Marshall that they arrange for a 1:00 o'clock luncheon recess rather than 12:15 and that will be at the mid-morning break.

After that, after you've had your lunch you will come back here and I will charge you with respect to the principles of law which should guide you in your deliberations and then the case will be submitted to you. So it will reach you, well, if we come back at 2:30 tomorrow afternoon it probably will reach you around 3:30 or 3:45 p.m. tomorrow.

In the meantime, of course, you just make yourselves at leisure this afternoon, the balance of the afternoon and enjoy yourself as much as you can. I know what it means to be confined to a hotel but it's fine for awhile. You get a little tired of it, I suspect.

But that's the present schedule and you, of course, are not to discuss the case in the interim even though the evidence is concluded. You may be excused at this time.

(The proceedings continued in the absence of the jury.)

THE COURT: I take it, then, gentlemen, that all witnesses may be excused; is that right?

MR. SHAW: Yes, your Honor.

MR. GOODMAN: Yes, your Honor.

THE COURT: I will be glad to meet with counsel in chambers. I have prepared the charge but it's not organized yet from the standpoint of where the particular paragraphs go and I would like to go over some of these matters with you. I don't think there's too much disagreement as to the nature of the charge because it follows basically with some additions the charge previously given relevant on these counts.

MR. GOODMAN: Your Honor, before we adjourn to chambers --

THE COURT: Oh yes, you wish to make a motion?

MR. GOODMAN: Your Honor, if it please the Court, pursuant to 29B of the Criminal Rules of Procedure, Judge Claiborne would move for a judgment of acquittal on Counts V, VI and XII.

We believe that after the evidence has been presented that it is not of a satisfactory nature to have the matter be presented to the jury because a reasonable-minded juror would not be able to conclude beyond a reasonable doubt that the Defendant is guilty.

On the basis of sufficiency of the evidence we want our record preserved and we are challenging that on all three counts. In particular as to Count VII it is our position that there is nothing to go to the jury other than a note by Jay Wright which he has no independent present recollection. He's unable to testify to it, he's assuming how the note appeared on a piece of paper and that is the only basis upon which Judge Claiborne was charged in Count VII with the Grand Jury not even knowing from whom the purported loan was made.

There is no independent report or corroborative evidence whatsoever that, in fact, Judge Claiborne received a loan but rather all of the evidence which has been presented in the case rather than the assumption of Mr. Wright would suggest to any reasonable-minded juror that Judge Claiborne received a gift of $100,000 in 1972 and on that basis we would move for a judgment of acquittal.

THE COURT: I will have to deny your motion. May I inquire, I haven't examined these tax returns but I assume and there were no questions of any witnesses but they are in evidence and I assume that tax returns for the two years in question do contain the language of the declaration being under penalties of purjury? I take that to be true. I haven't examined the returns.

MR. SHAW: They do, your Honor.

THE COURT: I take it that's true, isn't it?

MR. GOODMAN: They are. Your question was directed as I understand it to Counts V and VI, your Honor; is that correct?

THE COURT: Yes

MR. GOODMAN: And the 1040's do, in fact, contain that language.

THE COURT: They do contain?

MR. GOODMAN: Yes.

THE COURT: I will deny the motions. I'm not commenting at all about Count VII. I agree with you, Mr. Goodman, that there is no corroborative evidence. I think it's necessary, however, since the, according to Mr. Wright, it was the Defendant who made the statement to him that it was a loan and that was the way he treated it for all purposes on the tax return. Of the financial disclosure only he did not, but that's the way Judge Claiborne treated it, that it was not a loan.

That's a statement he made. I'm not saying it's true, I'm not saying what I would do with it, as far as I'm concerned, but is there any law where a Defendant makes a statement such as that that you need further corroboration? I don't understand that the law requires that there be proof by way of a copy of the note being produced to anybody or that the source of the loan be discovered.

MR. GOODMAN: No, that would be a matter of inference to be drawn by the finder of fact. However, the basis upon which we are really hanging this particular aspect of the motion is that on examination Mr. Wright does say and that's the evidence which is before the jury, that he has no recollection of these events.

THE COURT: He has no present independent recollection.

MR. GOODMAN: Right, but rather is assuming because of his usual procedure that Judge Claiborne told him that.

THE COURT: All right. The motions are denied and, gentlemen, I'll see you in chambers then with respect to the charge.

(The proceedings continued in chambers at 2:10)

THE COURT: Let's put on the record then this is the charge conference in connection with the case of United States against Harry Eugene Claiborne, attended by all counsel. Judge Claiborne, the Defendant, has elected not to be present, although he was invited to be.

One of the inquiries that I had earlier in connection with the charge conference was a request by Mr. Johnston and other counsel for the Defendant that a charge on the subject of willfulness be given and they desire that willfulness be stated as follows, perhaps after the usual Pomponio instructions they suggest, quote, "Willfulness may not be inferred solely from evidence that Judge Claiborne file returns which understated his income". And then it goes on, "While willfulness may be inferred from other facts, the mere fact that income is understated on a return is insufficient to raise an inference of willfulness on the part of the Defendant".

Of course, the case of United States against Pomponio, 429 U.S. 10 decided by the Supreme Court in 1976 is the controlling question on this instruction and in going down through the other authorities, principally United States against Doan, D-o-a-n, 710 F.2d 124 at page 126 decided by the Third Circuit in 1983, it does state, quote, "The understatement of income standing alone is insufficient to sustain a conviction of tax perjury".

The question comes up whether or not a charge should be given to that effect. There is definitely some marked distinction between drawing an inference and sustaining a conviction. Apparently in the Doan case that was a situation that it wasn't sufficient to sustain a conviction. You will notice the other authorities, a memorandum was given to you gentlemen earlier, I think early this morning, citing United

States against Allan, 551 F.2d, 108 at page 210 from the Eighth Circuit in 1977. United States against Tager, T-a-g-e-r, 479 F.2d 120 at page 122, the Tenth Circuit, 1973 with certiorari being denied in 1974 where it says, "Knowing and willful falsification may be inferred from repititious ommissions of items of evidence".

And then there's a First Circuit case that holds to the same effect. If I gave the requested instructions as tendered by the Defendant it seems to me that this would be in conflict with the evidence in this case. There were certainly repititious ommissions of items of evidence, of items of income, rather, and my thought is that I should confine myself to just the Pomponio instruction without anything more.

Did you have a chance, Mr. Johnston, or anyone else representing the Defendant, to read these cases?

MR. JOHNSTON: I have not, your Honor. We were so busy during the morning recess and the noon recess that there was no opportunity to look at this at all.

THE COURT: If you'd like to pull them down we'll just take a recess and let you take a look at them now.

MR. JOHNSTON: I'd like to do that and may I make this comment also. Your Honor is making a distinction between evidence sufficient to raise an inference and evidence sufficient to sustain a conviction. Would you consider an instruction similar to the first sentence that's been written on these notes by Bryan, if you have those before you, Judge, which would generally be to the effect that you may not find that the Defendant willfully --

THE COURT: But then I would have to add in, "but if you believe beyond a reasonable doubt", or just to the effect, one, just add to the effect the language knowing and willful falsification may be inferred from repititious ommissions of items of income and that has not been requested of me and my present thought is to leave it solely on the basis of the Pomponio case..

MR. JOHNSTON: Pomponio really doesn't address the question that we're talking about now, Judge, which is the issue of whether there has to be some additional evidence to prove the element of willfulness in addition to the fact that the return that was filed was incorrect. That's the issue.

THE COURT: Well, this First Ciruit case, do you have it there?

MS. LITTLE: I have it here, your Honor.

THE COURT: When I read this it was a shocker. Oh page 26 of United States against Drape, 668 F.2d at page 22 and then the quote that they have here is on page 26, quote, "Intent may be established where a taxpayer chooses to keep himself uninformed as to the fullest extent that the return is insufficient".

MR. JOHNSTON: I don't really believe that's applicable.

THE COURT: I think you better stick with the Pomponio definition and just not worry too much about that matter. But I want to give you an opportunity to read these cases and since Mrs. Little has a copy, she just had them made, I guess.

MR. JOHNSTON: Mr. Goodman doesn't want to read any cases. Let me make one further comment and perhaps we can abandon the point. My point is this. Is your Honor going to instruct the jury that there are several elements to the offense of willfully filing a false return?

One element is that the return is, in fact, false or incorrect. A separate distinct element is that the Defendant acted willfully, knowingly. My point is that the jury should not be allowed to infer the second element simply on the basis of the evidence of the first element, they shouldn't be able to infer one element on the basis of other other element. I think this is a good statement of law regardless of what this says.

THE COURT: I understand your point but if I have to go into the subject of willfulness to any great extent I'm afraid that Judge Claiborne might suffer by it from the authorities.

MR. JOHNSTON: Counsel adivses that we should give up, your Honor, on this point and we will do so.

THE COURT: Well, I want to give you an opportunity to read these cases because I read through them rather hurriedly, of course, and my law clerk, however, has read through them and pulled them down. I don't know where he picked them up from. He didn't pick them up from the Government's --

THE LAW CLERK: No, I got it out of the annotated books.

MR. GOODMAN: Your Honor, could we have ten minutes and we'll look through these cases ourselves?

THE COURT: Yes, indeed.

(A short recess was taken.)

THE COURT: I asked my law clerk to deliver to you a proposed charge that I'm looking at now and am on page 7 making corrections. The charge is not organized from the standpoint of where particular paragraphs will go but I will take care of that later. The main thing is to get to you the proposed copy of the charge and I propose to have it on the machine that's out there.

I don't understand these memory typewriters. I don't know anything about them but they tell me that the secretary does. If I want to put a paragraph some place else other than where it appears that you can do it in the original copy of the charge. Of course, I will get copies for you in due time, but it's my plan to do it at the time the jury is charged to have a copy so that we can avoid the necessity of rereading it during the course of trial.

I haven't checked these dates, gentlemen, on the judicial notice thing.

THE LAW CLERK: There's a correction on the first date. That should be January 16th, 1979. It fell on a Tuesday.

THE COURT: Where did she get this? Oh, here it is. January isn't it? Well, on a Monday it says here.

MS. LITTLE: It turns out I was using the calendar out of the phone book which is erroneous.

THE COURT: That's great.

MR. JOHNSTON: I'm looking at the calendar in the phone book. It shows the 6th on a Saturday and a 7th on a Tuesday.

MS. LITTLE: You'll notice this calendar is missing January 14th.

MR. JOHNSTON: Not the one I'm looking at. It shows the 14 on the Monday. Different phone book maybe.

MS. LITTLE: This is from the Las Vegas phone book.

THE COURT: 1979. Let's see October 2 on this 100 year calendar or 220 year calendar.

THE LAW CLERK: There's another correction on this calendar, April 12th, 1980 falls on a Saturday.

MR. RAGGIO: We're concerned about April 11th. April 11th falls on a Friday. It should be April 11th.

THE COURT: How important is that date, January the

16th.

MS. LITTLE: It's as important as all the other dates. We can insert it by saying it's falls on a Tuesday.

MR. JOHNSTON: My recollection is it's important. There was testimony because he must have received it from Judge Claiborne which was the basis of his letter to Stanwell sometime after January 16th. Some of that came from --

MR. HENDRICKS: No. This relates to some of the dates of the checks.

THE COURT: Is it important?

MS. LITTLE: We would like the instruction that January 16th fell on a Tuesday.

THE COURT: Then you've got to prove to me that this calendar that is attached to your motion and filed -- January 16th on another calendar falls on a Tuesday. This calendar, however, it's hard to read, number two, January 16th falls on a Monday.

THE LAW CLERK: There's no 14th. It goes from 13th to 15.

MS. LITTLE: I think Mr. Johnston has indicated that the calendar in the Reno phone book is correct.

MR. JOHNSTON: I'm reading it. I don't know whether it's correct or not. I'm looking at it.

THE COURT: If you can't agree I'm going to delete that date.

MR. JOHNSTON: January 16th, 1979.

MR. RAGGIO: How about as interested as you are, Judge Hoffman?

THE COURT: Can you agree that January 16th, 1979, fell on a Tuesday?

MR. JOHNSTON: That's what this calendar says.

THE COURT: I understand that. Have you checked these other dates?

THE LAW CLERK: The only other date that's in connection with the April 12th date --

MS. LITTLE: That should be April 11th. That's the one you requested.

MR. JOHNSTON: That's the critical date. April 11th is a Friday.

THE COURT: There's no question about that.

THE COURT: What happened on July 30, 1981?

MS. LITTLE: I believe that's the date that the tax refund, the date that the tax refund check was cashed.

THE COURT: All right. Are we in agreement on the judicial notice dates, gentlemen, as modified?

MS. LITTLE: Yes, we are.

MR. JOHNSTON: I think so, your Honor.

THE COURT: All right, then, that's fine. Congress, your Honor, ran a peculiar twist into taking judicial notice in criminal cases. It was sent in the same way. Civil and criminal were sent in by the Supreme Court from the Rules Committee saying that they could accept it as conclusive of any fact.

But Congress modified it and if you look at the rule it says, "In a criminal case the Court charges you that you may but are not required to accept as conclusive any fact judicially noted. I've taken judicial notice of the foregoing dates and the days of the week they fall. You may, therefore, in your discretion accept these dates and the days of the week that they fall. You may" -- well.

MR. JOHNSTON: There's a repitition their, your Honor. I'd suggest the first one be deleted. The second one has something additional that should be appropriate.

THE COURT: If you look at the rules, the first sentence there I have to put it in there unless you want to express your view on it.

MR. JOHNSTON: No. But the first one repeats what the second one says.

THE COURT: I'm deleting the repitition part. Now, gentlemen, I think your recollection about Judge Decker, Mr. Goodman, is probably correct.

MR. GOODMAN: I can't represent to the Court now that it is correct. That was my impression.

THE COURT: Have you gone over it?

MR. GOODMAN: We spoke with the reporter. I did not speak with her myself but somebody did. I'm not sure when.

MR. RAGGIO: I can tell the Court I spoke to the other lady in the office who said Suzie had left a note indicating that she had gone through it as best she could but she was on some other assignment. She cannot find a specific reference to his saying illegal or unlawful.

THE COURT: Well, Bryan thinks that it came up in the absence of the jury maybe. But I'm not prepared to say. I think that you are entitled to an instruction if that's what it says but I am at a loss as to what to do because if he didn't use the words illegal and unlawful in the presence of the jury -- I don't care what he did before me and before the rest of us. I can't see where it can hurt the Government in any way.

MR. GOODMAN: Your Honor, may I suggest that we begin that particular phase of the instructions on what would be the second page or page 17 with the word, "The Defendant is not on trial", rather than it would be "The Defendant is not on trial for making errors in his financial disclosure forms", et cetera, rather than to call specific attention to the fact that Judge Decker did or did not use the phrase illegal or unlawful?

MR. SHAW: That misstates the law.

THE COURT: You mean don't mention anything about Judge Decker?

MR. GOODMAN: Right.

THE COURT: Well --

MR. SHAW: That doesn't make any sense and it isn't really a statement of the law.

THE COURT: That doesn't make sense because what I'm trying to do is comply with your request.

MR. GOODMAN: All right, we'll leave it as is.

THE COURT: If Judge Decker referred to it --

MR. RAGGIO: I'm inclined, your Honor, to feel that if he did not say it in front of the jury that we should not have it in there.

THE COURT: Well, I can't guarantee about whether he did or did not, Bill.

MR. RAGGIO: I'm more or less satisfied by the report I got and my recollection is the same as Bryan's, that if it was said it was said outside the presence of the jury, so I don't want to now give the jury the impression that he said that if he didn't say it.

THE COURT: No, you can get in trouble that way.

MR. RAGGIO: So I think we better just leave it out.

THE COURT: Could we handle it this way? Is it agreed that, Judge, that there will be no comment in argument about Judge Decker having said this is illegal or unlawful.

MR. GOODMAN: That's certainly agreed by us.

MR. SHAW: To take it out?

MR. GOODMAN: No, nobody will argue that Judge Decker said that this was illegal or unlawful.

MR. SHAW: Oh, I agree.

MR. GOODMAN: That resolves it then.

MR. SHAW: So it's coming out.

MR. GOODMAN: It will come out altogether.

MR. SHAW: We agree.

THE COURT: It's agreed that nothing will be said by either counsel as to Judge Decker having referred to as it being illegal or unlawful and that would eliminate that instruction.

All right. Now, if you've had an opportunity to go over the charge except for the same exception you took last time which was objected to, the deliberate ignorance charge, and we'll let that continue, that objection is now noted. Is there anything else from the Defendant that you would like to comment on, if you have had time to go over it? There are type errors and as I previously mentioned I'd to have rework this to put it in here and there.

MR. JOHNSTON: Judge, we've been reading these separately and we haven't caucused about it.

THE COURT: You may have a board of director's meetings anytime you want to.

MR. JOHNSTON: My suggestion is we go page by page and if I make a comment --

MR. GOODMAN: Let's take a break and do this.

THE COURT: Do you want to take about a 15 minute recess?

MR. JOHNSTON: Shouldn't take very long, Judge.

THE COURT: You can have your board meeting here or you may go to your private office if you have care to.

MR. RAGGIO: You don't serve refreshments here, Judge.

THE COURT: Now the verdict form will be identical, gentlemen, except for the last one. I haven't prepared it yet. Identically the form that was used which you previously approved in the last trial except, of course, it will not have Counts I, II, III and IV.

MR. JOHNSTON: If you will excuse us, Judge?

(A short recess was taken.)

(The charge conference continued in chambers at 3:35 p.m.)

THE COURT: All right, gentlemen, representing the Defendant, what comments if any do you care to make with respect to the proposed charge?

MR. GOODMAN: All right, your Honor. Turning to page 5.

THE COURT: This, of course, would not be page 5 on the original necessarily.

MR. GOODMAN: Right, about five lines from the bottom the words, "Nor are you concerned with the methods adopted by the Government in bringing this case to trial". I don't know what that does as far as a juror -- I think it almost makes a juror think about it. It's also a subliminal invitation.

THE COURT: No, not necessarily. In your opening statement as I recall and I don't know the exact words and there was no objection, something to the effect that the Government had selected Judge Claiborne as a target, I believe you used the word target.

MR. GOODMAN: I wouldn't be surprised.

THE COURT: There's just no evidence here that he's a target any more than any Defendant in a criminal case is a target. Of course, to that extent --

MR. GOODMAN: We don't feel that --

MR. RAGGIO: Let me reply, your Honor. I didn't deduct any evidence throughout the trial that even opened up the issue of methods adopted by the Government in bringing this case to trial.

MR. SHAW: So it won't be argued by the defense, then?

MR. RAGGIO: My point is I don't know of any evidence of anything that was brought out about that.

MR. HENDRICKS: I think during the direct questioning of Judge Claiborne there was a question which may have led to an answer like that. I objected to it, it was sustained and there was no further testimony on the subject. I think that's all I can recall.

THE COURT: And Judge Claiborne himself referred to the methods of the Department of Justice on several occasions, I believe. He didn't refer to them as applied to this case but he referred to them as applied to other cases.

MR. GOODMAN: We don't feel that strongly about it.

MS. LITTLE: We would agree to taking out that whole sentence.

THE COURT: Do you want the whole sentence out? That means you want to eliminate quote, "You are not concerned with any result of any prior trial nor are you concerned with the methods adopted by the Government in bringing this case to trial"?

MR. RAGGIO: I'd agree to take the whole sentence out.

THE COURT: Well, the Government is willing to have it stricken.

MR. HENDRICKS: If the defense is planning on arguing something like that during their closing there's going to be an objection to it and I would think that might be a proper admonition at that time, your Honor. If there's not going to be any argument about this targeting, I don't see why it need be --

MR. RAGGIO: I don't think anyone has any intention of arguing the results of the last trial and I don't think Judge Hoffman is going to allow that.

THE COURT: You anticipate my ruling in advance.

MR. RAGGIO: Well, I'm getting to know you, Judge.

MS. LITTLE: Do we understand that you will be arguing the target theory, though?

MR. GOODMAN: I will attempt to.

MR. HENDRICKS: We better keep it in, then. If he's planning on doing it, perhaps we better keep it in.

THE COURT: Yes, I guess so.

MR. SHAW: Can't we deal with it in limine and avoid the whole thing?

THE COURT: What do you want to do?

MR. SHAW: I thought perhaps we could deal with that issue in limine. If Oscar is suggesting that he's planning on arguing the Government was targeting him, we are determining it's going to be objected to, it seems to me that that objection could be determined in chambers.

THE COURT: It will be promptly ruled upon. There's no evidence in this case of any improper procedures or methods adopted by the Government with respect to the investigations of Judge Claiborne's tax returns or the financial disclosure form.

MR. GOODMAN: We'll go on to page 8.

THE COURT: Leave it in, I take it?

MR. HENDRICKS: Also, your Honor, I really think in light of the clear state of the record as to the evidence, the lack of any evidence of this and in light of our present conversation, for counsel to argue what he knows to be an argument which is completely unfounded is a really --

MR. GOODMAN: I don't intend to do that. I don't want to disclose what my argument is going to be.

THE COURT: You may be reprimanded.

MR. GOODMAN: But I know what the rules are.

MR. SHAW: Then we want it on the record. The only time it would be necessary that if it was stated, objected to and sustained, then perhaps there should be an instruction at this time.

THE COURT: I will instruct them at that time that they will be told in the final charge that they are not to consider any methods employed by the Government in bringing this case to trial.

MR. SHAW: But if it's not argued, then we would like to take that whole sentence out.

THE COURT: But he says he's going to try to argue it.

MR. SHAW: But I think he says now he doesn't want to commit himself to that.

MR. GOODMAN: I know what the rules are and I plan to abide by them.

THE COURT: Well, knowing the rules sometimes doesn't cover it. I mean I don't know what you would try to say about it. If you're not going to say it, that's one thing.

MR. GOODMAN: Well, perhaps -- I understand what you're saying I think we better leave it in.

THE COURT: Page 8, now you say --

MR. GOODMAN: Page 8, yes, you have already recognized our exception to the deliberate disregard. As to the next paragraph you will note the indictment charges that the offenses were committed on or about. I don't think there's any issue as to that as there was in the first case and we would ask that that not be given, the on or about instruction.

THE COURT: Of course, the indictment is actually being read to them, that it's incorporated in here and it does refer to on or about.

MR. GOODMAN: Oh these counts?

MR. RAGGIO: Yes, it does but I don't think there's any issue in this case.

MR. SHAW: But a juror may find that on his own to find there's some evidence that maybe it wasn't sent on the 15th.

MR. JOHNSTON: I think so. This language of indictment, if I remember right, deals with the date of filing, doesn't it?

THE COURT: How can it?

MR. GOODMAN: It doesn't. The next paragraph.

THE COURT: Deliberate ignorance paragraph is not on that page.

MR. RAGGIO: No, we were objecting to the paragraph, "You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of the act".

MR. GOODMAN: We went over that in the last trial, your Honor, where the Court said, the Sanstrom case really spoke to a presumption and did not address an issue of an inference.

MS. LITTLE: I can advise that there's a brand new case, the U.S. v. Johnson. The cite is -- no relation, I presume.

MR. JOHNSTON: My name has an ST in it.

MS. LITTLE: 73 F.2d 373, Ninth Circuit, 1984 and this specific paragraph being the language was approved explicitly.

MR. RAGGIO: Do you have that here?

THE COURT: All right, your objection is noted to that and I take it we will leave it the way it is, which reads, quote, "You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequence of acts knowingly done or knowingly ommitted. As I have said, it is entirely up to you to decide what facts to find from the evidence".

And in the Ninth Circuit Johnson case, not Johnston, it's Johnson, that Mrs. Little has referred to it reads, "You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done".

MR. RAGGIO: Is that a similar charge, your Honor?

THE COURT: The same as we have here except I've got knowingly done or knowingly ommitted.

MR. RAGGIO: My question is what type of case was that? I'm not familiar with the case.

THE COURT: The importation of narcotics and they raise the question of --

MR. GOODMAN: Judge Claiborne hasn't been charged with that yet.

THE COURT: And they raise the question of Sanstrom against Montana and the Court says, it included the disclaimer that, quote, "It is entirely up to you to decide what the facts are from the evidence in the case", and that's exactly what I've got.

MR. RAGGIO: My only question would be in this type of case what acts are there that would give rise to such an intention intending natural and probable consequences of acts. I can understand it in a narcotics case but I don't understand it in a false statement case. I mean I don't see where that --

THE COURT: It was different.

MR. JOHNSTON: What consequences are referred to?

MR. HENDRICKS: If you give a person with a piece of paper with a legal fee represented on it and then that legal fee shows up on a Schedule C of a return, the natural and probable consequence of giving them that legal fee figure is that it will be included on the Schedule C of a tax return.

THE COURT: The case is certainly in point. I can't control what the Ninth Circuit may do afterwards or the special court, whichever might have to handle it if there's a conviction. What's next? Your objection is noted on that particular charge.

MR. GOODMAN: The next paragraph, "Remember that only this Defendant is on trial here". We don't believe that there's any issue that there's anybody else on trial. I think that issue --

THE COURT: You want that sentence eliminated?

MS. LITTLE: We did agree, your Honor, to take that --

MR. RAGGIO: What does this pertain to?

MS. LITTLE: I'm sorry?

MR. RAGGIO: What's the reason for it? What's the necessity of it?

MS. LITTLE: I think to some extent Mr. Wright has been put on trial and certain other Government witnesses.

THE COURT: We ought to put Mr. Watson on trial.

MR. JOHNSTON: They are not on trial any more than some of the defense witnesses are on trial, I suppose, other than Judge Claiborne.

MS. LITTLE: That's why the paragraph is appropriate, though.

MR. JOHNSTON: But none of them are really on trial. I don't think the jury thinks anybody else is on trial other than Judge Claiborne.

MR. RAGGIO: But that has a tendency to diminish erroneous acts on the part of other people including Mr. Wright and others. Certainly it's appropriate for them to contract erroneous acts on the part of other persons and this instruction it seems to me would tend to take that province away from the jury.

THE COURT: I think that this same charge was contained in the first trial without exception.

MR. RAGGIO: That could be, your Honor, but I do think that --

THE COURT: My mistake was giving you the board of director's meeting. I'll leave it in.

MR. RAGGIO: We'd note an objection for that reason, your Honor.

THE COURT: Yes.

MR. GOODMAN: Going to page 10, your Honor. We would object to the paragraph beginning with section 6064, that entire paragraph. There's no issue in the case that Judge Claiborne did not sign these returns and of course that will not be argued.

THE COURT: All right, what's the position of the Government on that? That's the law, of course.

MS. LITTLE: It's our position, your Honor, that proving that the Defendant signed the tax return is one of the elements of the offenses and to the extent that this paragraph accurately reflects the law we believe it should be included.

MR. RAGGIO: He's admitted he signed every one of them.

MS. LITTLE: Did he admit that on the stand?

MR. JOHNSTON: Of course.

MR. RAGGIO: Absolutely.

THE COURT: I gave this also at the last trial where the facts with respect to the tax returns with essentially identical.

MR. RAGGIO: Further, your Honor, I think that to start off a section of the charge citing a provision of section 6064, et cetera, gives it an added dignity that certainly isn't necessary and should not be included.

THE COURT: That's been done many times and I've read many a charge --

MR. SHAW: I'm not sure that the statement by the Defendant on the stand is the same thing as a stipulation between the parties as to an element of a crime.

MR. JOHNSTON: An admission.

MR. SHAW: It's evidence of it but it's still an element that we have to prove.

MR. GOODMAN: If the Court is inclined to give the instruction then we would request that it start with the words "the fact". The quoted part would not been in quotes but it would attack the fact that an individual's name as signed to a record is prima facie evidence for all purposes that the return was actually signed by him, period, no end of quote and then the next sentence would also appear.

MR. JOHNSTON: Why leave in "for all purposes"?

THE COURT: You all put this in your request for the charge that you have handed me.

MR. RAGGIO: No, I don't think so, your Honor. I've compared it with our charge and I think it is not in there.

MS. LITTLE: We put it in ours, your Honor, but I think the Defendant did eliminate it from theirs.

THE COURT: I know it was in the prior trial.

MR. JOHNSTON: There's never been any issue about whether Judge Claiborne signed the two returns that are involved in this trial.

THE COURT: Well, he claims he signed the 1979 return in blank.

MR. JOHNSTON: That's right, but he signed it.

MR. SHAW: It's the same thing arguing that there's never an issue that the returns were false, the Defendant agreed on the stand that's false but it's an item we have to prove and it needs to be in the record.

MR. JOHNSTON: We have admitted they were filed, that's not an issue.

MR. HENDRICKS: I'm not sure there's an admission. What he's admitted to is that he'd signed a piece of paper which was not really at the time he signed it a return and it could be very well argued that he never really signed a return that was filled out. He signed a blank piece of paper. I think we're entitled to have the legal requirements here set forth with some precision because of the lack of agreement as to precisely what was done and what time with respect to his subscribing to those returns.

THE COURT: Does the Government want it in?

MS. LITTLE: Yes, your Honor.

THE COURT: I don't see where it does any harm at all. It's a correct statement of the law.

MR. RAGGIO: Your Honor, then going to the next paragraph and I feel very strongly about this. It reads, "If it appears beyond a reasonable doubt from the evidence in the case that the Defendant signed his tax return", that should say, we submit, "That the Defendant signed his completed tax return. Only then would you draw the inference that he had the knowledge". We would submit that the word "completed" should be inserted.

THE COURT: No, I don't think so. If the Defendant and an accountant are permitted the practice of having a tax return signed in blank, why can't they draw the inference that Defendant had knowledge of what the contents of the return would be?

MR. RAGGIO: Well, I understood the law to be that's the inference of knowledge and contents of the return would be inferred in the case where the Defendant, where the taxpayer signed a completed tax return, not a return in blank.

THE COURT: Judge Claiborne did not admit that he signed a completed tax return.

MR. RAGGIO: That's what I'm saying, your Honor, that's my whole point.

THE COURT: Does anybody have any law about what the situation is with respect to a taxpayer who signed a blank return?

MS. LITTLE: Your Honor, when we went over this the last time we pulled this instruction from Devitt Blackmar, we got the instructions from Devitt Blackmar the last time and I don't recall exactly what the basis for it was in there but it was this precise language that as far as I recall was taken out of Devitt Blackmar, 35.14. It appears that it was taken from that but it's not quoted exactly.

MR. RAGGIO: I don't disagree with that statement of the law. I think it's a correct statement of the law that if a taxpayer signs a tax return and it's completed that there is properly an inference drawn that he had knowledge of the contents. But going back to my point with Judge Hoffman, if there's evidence that he signed it in blank and didn't sign a completed return, I think the jury has to first find that he signed a completed tax return in order for such an inference to be drawn.

MR. SHAW: Or on the other hand, the fact that they are finding that it was signed in blank would be the other evidence that is rebutting that inference.

MR. RAGGIO: Well, no.

MS. LITTLE: The instruction does include a provision for rebutting any presumption.

MR. RAGGIO: It seems just basic logic is that it would have to flow that if he didn't sign a completed tax return that inference shouldn't follow. I really don't see where the Government is giving up much because you're contending that he did sign a completed tax return.

THE COURT: Here's the Drape, D-r-a-p-e, case from the First Circuit in which it says, "In the course of the meeting appellant signed several documents presented to him by Garfinkle including papers related to Garfinkle's co-tax shelter partnerships, S, J and G and E, a problem noted in blank, a power of attorney and an offeree representative disclosure note. At trial appellant testified that when he signed these documents there were no dates on them and he did not observe that some of them required notarization. However, as a result of the documents which were received at trial were dated December 5, 1976 and were notarized. Garfinkle informed appellant during a meeting that his accountant Shocker would prepare Appellant's 1976 federal and state income tax returns to reflect his new investment in the co-tax shelters. Appellant's wife testified at the trial that she questioned Garfinkle about the legality of the transaction and he assured both of them that they were legal. He relied on his accountant to prepare income tax returns but they were actually signed. by him apparently".

The only thing that is mentioned here, Judge Bonsal, B-o-n-s-a-l, who wrote the opinion said, "Appellant's signature on his return was sufficient to establish knowledge once it had been shown that the return was false". That is a First Circuit Case, U.S. against Romanow, R-o-m-a-n-o-w, 509 F.2d, 26. It's at page 27.

Of course, the Defendant can properly argue that he signed a blank income tax form and therefore he didn't know what the contents would be. I'm not disputing that.

MR. JOHNSTON: Judge, it seems like a matter of ordinary logic that if a person signs a document that doesn't have any writing on it there's no basis for inferring that he had knowledge of the contents that were later put on the document.

THE COURT: Of course there's evidence now to the effect that Judge Claiborne signed the return.

MR. RAGGIO: Yes, your Honor, and that's what I'm saying. The Defendant contends that and the Government contends he did not. That was my suggestion for inserting the words completed tax return and if the jury finds that then they can properly draw that knowledge, I was just trying to make the distinction which I thought was logical.

MR. LITTLE: The Drape case there was apparently some contention about signing blank pieces of paper and still the court --

MR. RAGGIO: Not the return.

MR. RAGGIO: According to what the Judge said he signed a note that had some dates.

MR. JOHNSTON: There was a document signed in blank but I didn't hear anything that he was charged with knowledge of the contents that may have been put in it later.

THE COURT: I think they go into that properly.

MR. JOHNSTON: There has to be some logical connection between facts that are proved and inference that may be properly drawn from it. That is basic.

THE COURT: Suppose all taxpayers in the United States signed their returns in blank, even though they certify, of course, that they have examined it and read it through.

MR. JOHNSTON: I don't think that would give rise to an inference that they knew what the contents were, it doesn't logically follow.

MR. RAGGIO: I think there had to be a showing that they knew what the accountant was going to put in the return.

THE COURT: Well, I think Mr. Goodman has jumped all over me for saying that I have put the burden on the Government to make a decision as to this. Taxwise the case is in the same category as it was at the prior trial. There wasn't even any objection at the prior trial.

MR. RAGGIO: I think we should be bound by --

THE COURT: But Mr. Raggio states that he wants the word, quote, "completed", end quote, between the word, quote, "his" and the word "tax", end quote.

Do you wish to have a board of director's meeting as to your decision?

MR. SHAW: No, your Honor. It's our view that the inference is logically drawn from the signature on the completed return which is in the evidence and if there is evidence presented that that signature went on at the time that it was blank that is evidence that is rebutting that inference and that's stated properly in the instructions.

MR. JOHNSTON: That's not stated.

THE COURT: Put "this inference maybe rebutted by evidence to the contrary", end quote.

MR. JOHNSTON: But evidence that he signed the return before it was filled in.

MR. RAGGIO: But that refers only to the knowledge of the contents. It doesn't have anything to do with whether the return was completed or not.

MR. JOHNSTON: What we're saying is --

MR. RAGGIO: I understand. I certainly can't see where it's any kind of a give-up for the Government to have that in there, your Honor.

MR. HENDRICKS: I think when a person subscribes to a return and certifies under penalty of perjury that he has examined the contents that you start at that point with a reasonable inference that he's familiar with it. Now there may be evidence thereafter that he's not but I think the starting point goes from the original certification under oath.

MR. RAGGIO: That isn't the law as I understand your Honor's reading. The law is if he signs a return and the return apparently has been completed that there's knowledge and inference that he knew the contents.

MR. SHAW: But there's no part of the law on this, Bill. Those are the facts in the return in the case he read but he didn't address that issue.

MR. RAGGIO: But you haven't cited any law that's on point in these facts.

MR. SHAW: You haven't shown any law to show that a blank return is different from the general law.

MR. RAGGIO: But it's logical, it has to follow, if the return wasn't completed how could you draw an inference?

MS. LITTLE: That's for you to bring out as rebuttal evidence.

THE COURT: Here a case of United States against Romanow, R-o-m-a-n-o-w, 509 F.2d, 26, 509 F.2d, page 26. It involves quarterly, employers quarterly federal tax returns and the Court said, "It is admitted that the returns were incorrect and that appellant signed those which were the subject of his indictment. Appellant contends, however, that he cannot be found to have willfully" and that's underlined or italicized, "violated the statute unless the evidence establish that he knew of the falsity of these entries. He maintains that there was no evidence that he had ever examined the contents of the returns, (which were prepared by a bookkeeper), merely that he had signed them and that the jury thus had no basis from which to infer the requisite knowledge.

"Able Pant's brother presented the same in his appeal and we decided that it was without merit, United States v. Romanow, 5.05 F.2d, 813, (First Circuit, 1974). We held that the jury could, quote, 'Conclude from nothing more than the presence of his uncontested signature that he had, in fact, read the form 941', end quote. We reach the same conclusion here". Then it goes on as to whether it was a material matter and so on.

MR. RAGGIO: I'd submit that's the same difference, your Honor, that's a completed return that he just didn't examine, he says.

MR. SHAW: But the emphasis on the phrase that the signature on the return and nothing more, meaning the Government would need to have proven --

MR. RAGGIO: Uncontested signature is what I heard him saying. We're contesting that the signature was on this return when it was completed and all I'm asking is for a simple insertion that it refer to a completed tax return.

MR. SHAW: That certainly is against the language of this. This said the signature itself, it didn't say the signature of the completed return.

MR. JOHNSTON: You have to read the opinion in the light of the facts that are stated. In that case it's clearly distinguishable from the facts in our case. In that case there was no question about returns signed in blank.

THE COURT: Well, thank the Lord for law clerks because you all don't dig up the law. Here's a case of United States against Harper at 458 F.2d 891, from the Seventh Circuit. Harper was indicted under 26 U.S.C. 2d, 7206 (1). That's the identical section that Judge Claiborne is indicted under, continuing, "Which makes it a crime to subscribe any return which the subscribing party, quote, 'does not believe to be true and correct as to every material matter'. To sustain a conviction under this section the Government must prove that Harper signed the tax returns which he did which he did not believe to accurately reflect the gross wagering receipts of Tri-State Enterprises. While it is undisputed that Harper signed the returns and that they grossly understated the gross wagering receipts of Tri-State, while it is unusual that the facts proved that Harper knew or believed that they were false. To support this contention the Defendant points to the fact that the accountant was not certain whether Harper had ever personally delivered the information used by the accounting firm to complete the tax forms. In addition he argues that the fact that the record was unclear as to whether the form was presigned renders the question of knowledge doubtful. We find that neither of these facts taken wholely or jointly is determinative of the question of Harper's knowledge or belief that the returns were inaccurate. While it is true that proof of a signature on a loan on a tax return is insufficient by itself to make knowledge of the contents of that return attributable to the signer", United States against Bass, B-a-s-s 425 F.2d 161 (Seventh Circuit, 1967).

Lurding, L-u-r-d-i-n-g, against the United States, 179 F.2d, 419 (Sixth Circuit, 1950), "It is equally true that knowledge may be inferred from the facts and circumstances of the case and that the signature at the bottom of the return is prima facie evidence that the signer knows the contents of the return". Bass, Supra at 167. Isn't that pretty close?

MR. RAGGIO: Pretty close, your Honor.

MR. JOHNSTON: I want to speak to Bryan about finding cases that assist the Defendant's position, your Honor. I haven't heard any yet.

THE COURT: Well, this is the first one I've heard that's consistent with this instruction. I suspect we leave it.

MR. RAGGIO: I have to acknowledge that that case seems to be consistent.

THE COURT: I think that answers it.

MR. RAGGIO: We would still object, your Honor.

THE COURT: Oh, yes. The Ninth Circuit could go different from the Seventh Ciruit all right. What's next after the page 10? Objection is noted to that.

MR. GOODMAN: The last paragraph continuing over to page 11 we would object to as concerning a matter which is really not at issue in this case. This is I think, in the last case this instruction applied to what was referred to as a Pecolli transaction and in this case nobody has taken issue with the fact that the Eccheveria check to the Vansickle estate was drafted apparently on the last day of 1977, 1979 but given to Judge Claiborne in the first week of January of 1980. So I think it's a nonissue.

MR. RAGGIO: Certain is not going to be argued by us in any way. There's no issue here.

THE COURT: What are you objecting to, then? It says here I've got to give the essentials, do I not?

MR. GOODMAN: Bottom of page 10, going over to 11.

THE COURT: "The evidence shows that the Defendant's income tax returns were prepared on a tax base. Under that method of accounting income is reported for the year in which it was actually received. Thus if the Defendant received something in the form of a check issued late in December of a given year it was reportable as income in this year. But if the Defendant did not receive the December dated check -- oh, it should be check only -- until January, it is reportable as income for the year in which January falls. The date when the Defendant deposited the checks does not determine the year in which it was reportable as income. The pertinent date is the date of the receipt of check of cash". What's wrong with it?

MR. GOODMAN: Nothing is wrong with it.

MR. RAGGIO: The real issue in the last case was the Pecolli check and there's no issue in this case involving this.

MR. SHAW: There is the Eccheveria check.

MR. GOODMAN: There is reference to the Eccheveria check. It's not bad law.

THE COURT: It's not bad law so let's give it to them. What's next?

MR. GOODMAN: Going to page 13, your Honor.

MR. RAGGIO: I just wanted to make sure that on page 12 the third full paragraph says you may not and it should be you may now.

THE COURT: That's a secretarial error.

MR. RAGGIO: That would concern me.

THE COURT: You needn't woory about that. It's now in the process of correction if she's reached it.

MR. GOODMAN: The second suggestion is on page 13 going down to the fourth paragraph trying to balance the instruction we would suggest that instead of there is, it should read, "The Government has presented evidence in this case," rather than a finding in the instruction that there is evidence.

THE COURT: Well, whether the Government presented it or who presented it I've told the jury it didn't make any difference who presented it.

MR. GOODMAN: Fine. We would ask that there is evidence in this case that the $75,000 deposit is the way the next paragraph would start.

THE COURT: All right.

MR. RAGGIO: In other words, they should read identical, your Honor, either way.

THE COURT: I'll change the words, "the Defendant has testified so there is evidence in this case that" --

MR. GOODMAN: Then I'd like to go back to the preceding paragraph, "The Government has presented evidence", and then the next sentence -- no, "The Government has presented evidence" -- "there is evidence in this case that the Defendant told his tax preparer, Mr. Wright, when Mr. Wright inquired if the $75,000 deposit of August 31, 1978, that this amount was a loan to the Defendant". Period. We would suggest the following insertion, "The Defendant has denied telling Mr. Wright this".

THE COURT: Well, this comes up in your arguments here. You insisted at the last trial that I summarize the contentions and that's all I've tried to do, summarize your contentions.

MR. SHAW: I think the very next paragraph showing that there is evidence that it is a loan is particularly the way it's worded now showing that there is evidence of both facts. I mean, we'd have to insert then in the middle of the paragraph --

MR. GOODMAN: All right, we'll leave it as it is.

MS. LITTLE: There's also another instruction on the next page again as to the contentions of the Defendant.

THE COURT: The next page is what was there the last time and I think there was law to support it. The Court should when requested to do so advise the jury as to the contentions of the Defendant and that is what I have endeavored to do. As a matter of fact, just in advance of the words, "I have previously advised you with respect to Counts V and VI, the so-called tax counts", and so on. I was going to put a heading in there contentions of Defendant ahead of that.

MR. GOODMAN: Then we go down to page 14. I objected last time, I'll object again to be consistent with any instruction concerning punishment.

THE COURT: I certianly am not instructing the jury what the punishment should be or anything like that. I've just used a stock instruction, "The punishment provided by law for these alleged crimes is for the Court to decide. You may not consider punishment in deciding whether the Government has proved its case against the Defendant beyond a reasonable doubt as to any particular count."

MR. GOODMAN: It's our position that it is not an issue, it's going to be argued and it interjects an issue into the case that's not there.

THE COURT: I've never tried a criminal case without saying that because otherwise you get before a jury in Federal Court and they start talking about, "Well, what's the Judge going to do if we find him guilty," and things like that and that's not a pertinent discussion in the jury room. Any other criticisms from the Defendant?

MR. GOODMAN: Yes. Page 16 --

MR. RAGGIO: Excuse me. Page 15, your Honor, on the paragraph that begins, "If it become necessary..." near the end, the last sentence. "Remember that you are not to tell anyone, including me, how the jury stands numerically or otherwise on the question of the guilt or innocence of the Defendant".

THE COURT: All right, I'll make that change.

MR. GOODMAN: Then we get to page 16. The last full paragraph starting with the words, "The evidence reveals that..." We don't believe that the refund is an issue in the case. Nobody would purport to argue that the refund was an approval of the tax return being filed.

THE COURT: Well, the jury doesn't know that, though. This instruction I must say to you after I inquired of Mr. Diaz, I believe, in the absence of the jury how in the world would the Internal Revenue Service ever issue a refund check over $44,000 on this particular tax return and he said he didn't know the procedures and so on. But the jury are entitled to know that the mere fact that a refund check was issued does not constitute an approval or acceptance of the tax return for the year in question.

MS. LITTLE: While we're on that paragraph, your Honor, in line 6, "does not constitute an aprpoval or acceptance of a tax return," just for purposes of clarity, line 6 of the same paragraph we've been discussing the sentence reads, "The issuance of a refund check to a taxpayer from the IRS does not constitute an approval", and we would like to insert there, "by the Internal Revenue Service", just for purposes of clarity. It's unclear from the way it's worded whose approval or acceptance it's referring to, whether it's the Internal Revenue Service or the Defendant.

THE COURT: "Tax return by the Internal Revenue Service for the year in question"?

MS. LITTLE: Right.

MR. GOODMAN: I thought that was implied.

MR. JOHNSTON: It seems pretty clear to me.

MS. LITTLE: It wasn't all that clear to me.

THE COURT: All right.

MR. GOODMAN: The last matter is the last page, 18. We believe that the instruction is really a matter for argument rather than instruction and we would object to the instruction being given. If it's going to be given we have some minor changes and that is seven lines from the bottom --

THE COURT: This jury doesn't know, Mr. Goodman, if the Judicial Ethics Committee is an arm of an agency of the United State Government. The jury doesn't realize that. For example, the Internal Revenue Service doesn't have anything to do with the Judical Ethics Committee and they may say -- well, the jury might conclude, "Well, the Judicial Ethics Committee, that's a branch of the Government and they had notice that there was only $22,000 income", and you all are going to argue about the $88,500 on the other return that was filed with the

Judicial Ethics Committee.

I've got to tell this jury as I see it that this did not come from the Government. I conferred with the only one I'm entitled to confer with, namely my law clerk, as to this problem and we discussed it at length as to whether this jury should be so charged and I believe that it may have been inferred at least in some argument that was made in the opening statement, I believe you mentioned something to the effect that $88,500 was referreed to and that's properly commented in the Judicial Ethics form.

But the jury won't understand that literally there's thousands of agencies of the United States Government and they might say, "Well, they had notice of this $22,000", or whatever the figure was, I don't know exactly, "and should have picked it up at that time and they had notice of the $88,500", rather, and I'm just telling the jury that notice of earnings filed with the Judicial Ethics Committee does not constitute any notice of earnings to the Internal Revenue Service, but you may consider the earnings filed with the Judicial Ethics Committee in determining the state of mind of the Defendant as to whether he made a full disclosure of all relevant facts to his tax preparers about his taxable income for the years in question.

This deals and I'm going to work this in right at the end of the discussion, with Counts V and VI. I don't think it's applicable to Count VII.

MR. GOODMAN: Understanding the Court's position, then we would suggest that there be modification. Rather than saying that they consider the earnings filed with the Judicial Ethics Committee, we would say reported to the Judicial Ethics Committee.

THE COURT: Reported to? "You may consider the earnings reported to the Judicial Ethics Committee".

MR. JOHNSTON: There's a notice of earnings filed, filed is already there, isn't it?

MR. GOODMAN: Yes. You're on a different line than that. I'm about seven lines from the bottom.

THE COURT: It would read, then, is this correct, "It's fundamental that a notice of earnings filed with the Judicial Ethics Committee does not constitute any notice of earnings to the Internal Revenue Service but you may consider the earnings reported to the Judical Ethics Committee in determining the state of mind of the Defendant as to whether he made a full disclusure".

MR. RAGGIO: Whether or not he made a full disclosure.

THE COURT: In determining whether or not what?

MR. GOODMAN: "In determining the state of mind of the Defendant in whether or not he made a full disclosure".

THE COURT: All right. I will agree with you to those modifications.

MR. GOODMAN: That is it.

THE COURT: How about the Government, what are you complaining about?

MS. LITTLE: Nothing, your Honor.

THE COURT: I call your attention to the fact that I've taken the part under miscellaneous which defines the word knowingly and I have run it through what is now the top of page 13 and immediately then precedes the Pomponio definition of the word willfully.

MR. JOHNSTON: I think the word knowingly is defined at two difference places in these instructions.

MR. GOODMAN: Right. That's fine.

MR. JOHNSTON: All right.

THE COURT: That's exactly why I've taken the part which starts under miscellaneous, "Perhaps I should state to you what is meant by the word knowingly wherever it is mentioned in this charge", and I've used the language on page 14, "An act is done knowingly if the Defendant realized what he or she was doing and did not act through ignorance, mistake or accident. You may consider the evidence of the Defendant's acts and words along with all the other evidence in deciding whether the Defendant acted knowingly", and I've just cut out that paragraph on the top of page 13. That is being substituted for it.

All right, gentlemen, Mrs. Little and Mary, we recess for the day at 4:30 p.m. having been in conference with counsel in connection with the charge. Thank you.

(Whereupon the proceedings recessed until 9:00 a.m., Thursday, August 9, 1984 when closing arguments were heard and the jury was instructed by the Judge.)

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JURY CHARGE CONFERENCE 1226

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, MARY E. BELL, Certified Shorthand Reporter Nmmber 98, do hereby certify that I was present on the 8th day of August, 1984, at the hour of 9:30 o'clocl a.m. thereof, in the United States District Court, District of Nevada, Reno, Nevada, and reported the proceedings in the within-entitled cause in stenotype notes, which were thereafter transcribed by me;

That the foregoing transcript, consisting of pages 1112 through 1272, contains a full, true and complete transcription of my said stenotype notes, and is a full, true and correct record of said proceedings had at said time and place.

DATED at Carson City, Nevada, this ____ day of September, 1984.

MARY E. BELL, CSR, RPR, CP
Nevada CSR #98

ORIGINAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATE OF AMERICA,)
)
Plaintiff,) Case No. CR-R-83-57-WEH
)
v.) Reno, Nevada
) August 9, 1984
HARRY EUGENE CLAIBORNE,) 9:00 o'clock a.m.
)
Defendant.)
. . . .

TRANSCRIPT OF PROCEEDINGS - CLOSING ARGUMENTS

BEFORE THE HONORABLE WALTER E. HOFFMAN

TRANSCRIPT ORDERED BY: OSCAR B. GOODMAN, ESQUIRE

For the Plaintiff:	STEVEN A. SHAW, ESQ.
	WILLIAM C. HENDRICKS, III, ESQ.
	JAN NIELSEN LITTLE, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ.
	WILLIAM J. RAGGIO, ESQ.
	J. RICHARD JOHNSTON, ESQ.
Reported by:	CAPITOL REPORTERS Certified Shorthand Reporters BY: MARY E. BELL, CSR #98 108 West Telegraph Street Carson City, Nevada

CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD Clerk
United States District Court
By
Deputy Clerk

RENO, NEVADA, THURSDAY, AUGUST 9, 1984, 9:00 A.M.

-oOo-

THE COURT: For the information of counsel, the verdict form is being prepared. It will be identical with the last proceedings except, of course, eliminating Counts I, II, III and IV. So you may guide your arguments along that line. Anything further before the jury is brought in? May I inquire who will open for the government?

MR. HENDRICKS: I will, your Honor.

THE COURT: Mr. Hendricks will open. Do you need a warning when we've reached a specific time, a signal?

MR. HENDRICKS: With ten minutes to go, your Honor, I'd appreciate some notice.

THE COURT: Ten minutes. Well, I'm talking about you will open and somebody is going to close and I want to know what warning you want after you've reached a certain period of time.

MR. HENDRICKS: I expect to take one hour, your Honor, so I'd appreciate --

THE COURT: Are you going to also close?

MR. HENDRICKS: No, your Honor, Mr. Shaw is.

THE COURT: Mr. Shaw, do you need a signal as to how much time you have left at the time of whatever is remaining?

MR. SHAW: Yes, your Honor, I would appreciate two minutes.

THE COURT: Mr. Goodman, do I understand you are to make all of the argument?

MR. GOODMAN: No, your Honor. If it please the Court, Mr. Johnston is going to start off, then Mr. Raggio and then I will close.

THE COURT: Do you gentlemen want any signals?

MR. JOHNSTON: Your Honor, I plan to speak for 45 minutes and I would appreciate a signal at the end of 40 minutes.

THE COURT: 40 minutes, all right. Mr. Raggio?

MR. RAGGIO: Your Honor, I expect only about 20 minutes and I would appreciate a signal at that time. I would not like you to throw the water bucket.

THE COURT: Well, I might do it. You wanted to be warned after 20 minutes?

MR. RAGGIO: Yes, sir.

THE COURT: You only expect to use 20 minutes; is that right?

MR. RAGGIO: That's correct, your Honor.

THE COURT: And you want to be warned at that time?

MR. RAGGIO: Yes, your Honor.

THE COURT: And assuming your cohorts leave you any time, Mr. Goodman, the remaining time, do you need anything with respect to a final time, whatever you have left?

MR. GOODMAN: Yes, your Honor. If the court would gently remind me with about two minutes left?

THE COURT: Two minutes left?

MR. GOODMAN: Thank you.

THE COURT: Mr. Hendricks, you expect to use one hour and you want to be warned after using that one hour; is that right?

MR. HENDRICKS: No, your Honor, after 50 minutes.

THE COURT: All right, after 50 minutes, I beg your pardon, and Mr. Shaw you want a two minute warning at the end?

MR. GOODMAN: Yes, your Honor.

THE COURT: All right, Mr. Marshal, you may call the jury.

Good morning, ladies and gentlemen. We are now ready for the final arguments and Mr. Hendricks, I understand, will open for the government. He anticipates using approximately one hour in his opening. After that we will probably take a short break for your convenience and then Mr. Hendricks has also asked me to give him a signal after he's used up as much as 50 minutes. That signal is not a reprimand to those lawyers. It's merely so that he doesn't have to turn around and look at the clock all the time and I will do it by hitting the water pitcher.

Then after a break, Mr. Johnston will open, I understand, for the defense and anticipates using approximately

45 minutes. He has asked me to give him a signal after he has used as much as 40 minutes. Mr. Raggio anticipates taking approximately 20 minutes in his presentation and after he's used that 20 minutes, he has also asked me to give him a signal.

Mr. Goodman will wind up for the defense and he has 20 minutes left. He has asked me to give him a signal. Probably after that you will have another brief break. Whatever time is left for the government, Mr. Shaw will use in the closing argument and when he has two minutes left I will give him the same type of signal.

You need not worry about either side going beyond the one hour and a half as in my 30 years experience on the bench as of September 3rd, 1984, I have developed a remarkable accuracy with the water pitcher and that will be the end. So they know when they have to stop.

With those remarks, Mr. Hendricks, you may open for the government.

MR. HENDRICKS: Thank you, your Honor. Good morning, ladies and gentlemen. This morning what I'm going to try to do is to recap the evidence, to go over the evidence that you've heard during the course of the last week. I'm going to try as best I can to recite, submit to you what I think is the evidence that you've heard and to reasonably argue inferences which I believe you are fully entitled to draw from the evidence that you have heard.

If your recollection is in any way different from mine, keep in mind what I say is not evidence and your recollection shall control. But I'm going to submit to you when I'm through with my argument that the evidence that you've heard is clearly sufficient to find beyond any reasonable doubt that the charges which have been laid in this case in the three counts that you've heard, that the government has met its burden of proof.

One of the things that you're going to be hearing about in the Judge's charge to you about the law is the question of knowledge. We have to demonstrate that Judge Claiborne acted in a knowledgeable fashion, that he acted knowingly and what is the evidence in this case as to his knowledge, as to the knowing aspect of his behavior? I'd like to talk about that kind of general knowledge first.

First we know that Judge Claiborne started his law practice in the middle to late 1940's and that for a period of 30 years he gained increasing experience running his own law firm. This is the kind of experience which is invaluable given a person who is knowledgeable of the very questions that have arisen in this case, substantial experience.

It's applicable to this kind of a case for 30, those 30 years, Judge Claiborne received legal fee income and he reported it consistently year after year as ordinary income just as many of you may report your salary income.

The third factor that we know about from this case is Judge Clairborne's personal experience with capitol gains transactions. You will recall that I asked him on cross-examination about his purchase and sale of Golden Nugget stock which he owned and he further admitted that he knew what capitol gains were, that he was experienced and knowledgeable about capitol gains transactions. That's another factor that goes into your evaluation of how knowledgeable this person is.

He's knowledgeable enough we know to be appointed a United States District Court Judge, a very substantial position appointed by the President of the United States and we also know that after he became a United States District Court Judge on September 1st, 1978, that he gained increasing and extensive experience in the particular area that is the focus of this case, that is tax law and you recall a series of cases, one case after another in which Judge Claiborne sat as the presiding Judge and that those cases involved some of the very issues that are involved in this case; the failure to report income and the making of false statements on income tax returns.

As a result of this experience, very substantial, very long-term experience, I think it's clear that Judge Claiborne as of the time involved in these counts knows about tax law and he is sensitive to the importance, he must be sensitive to and aware of the importance that is attached to the filing of income tax returns.

There is ample evidence, then, that Judge Claiborne is a person who is acting in a knowing fashion in the actions that he does, that you've seen take place in this case.

Now another factor that we don't have to prove but I think it's valuable as a beginning area for you to take into consideration is motive. Is there evidence of motive? Why would he do these things that the government is alleging he has done? I submit to you that there is ample evidence of motive and what is it?

Well, we know that through the years from the 1940 until the time he took the bench that Judge Claiborne, then Mr. Claiborne, became a famous man in the State of Nevada and he developed a tremendous income. For example, in 1977 his gross income was $375,000. His net income was something about $197,000 for the year.

Now what happened when he took the bench was that his income dropped dramatically from these high figures that he was earning when he was in private practice to a more modest figure of $55,000 as a Federal Judge and we also know that at the same time his salary was dropping from a very high level to a lower level, substantially lower level, that many of the expenses that he had when his income was high remained the same and one of the items that was brought up was alimony of $21,000.

Now consider that alimony of $21,000 is virtually 40 percent of his judicial salary. So we also know that as time goes along in 1980 by his own admission and by an exhibit in this case he admitted to being, quote, "desperate", for money, not just in need of money but desperate for money.

Those are the kinds of things which I think show a motive in this case. He had is standard of living that was very high, his income dropped and that's the kind of -- that's the kind of background that gives rise to a state of mind in which he is going to consider and start understating his income so that he can get the effective level of his income up. This is the motive in this case.

Now what is the evidence? What I'd like to do with you is to first go over the income tax year 1979 which is the first count that you have for your consideration. Then the 1980 year and finally the count that relates to the figure on the ethics in government form that was sent to the Judicial Ethics Committee.

With respect to 1979, now 1979 is the count that relates to returns maintained and filed with the assistance of Jay Wright, his accountant. What do we know about that?

Well, we know in the late '40s from the very outset of his law practice that Jay Wright was his accountant. We know that this relationship continued for some 30 years from the 1940 until the early spring of 1981 when Jay Wright ceased his relationship or Judge Claiborne ceased his relationship with Jay Wright.

During that 30 year period of time a system was developed for the maintenance of Judge Clairborne's books which system resulted in the filing of his income tax returns. This system was used every year on a routine basis for 30 years and this is what it was. According to the testimony of Jay Wright and according to the clear documentary evidence in this case and I don't believe, ladies and gentlemen, that there's a bit of disagreement as to the system that was devised.

The system was that when Judge Claiborne, then Mr. Claiborne, got legal fee income from a client, that he would receive the check and that he would give the client a receipt, that his law firm would retain a receipt. The next thing that happened was the client's checks would be deposited in his bank account.

The testimony was that the legal fee checks were always, without fail, always deposited. Now this is a practice, always deposit income checks, for 30 years this took place. So the checks go into the bank account and the deposit, the deposit slips on a monthly basis are then sent on a monthly basis to Jay Wright.

Jay Wright also received from Judge Clairborne's law firm receipts, a copy of the receipts that the client had gotten. So Jay Wright has the deposit and Jay Wright has the receipts.

You will recall Jay Wright's testimony that the assumption was, the agreement was that all deposits would be treated as income unless otherwise identified. So on a monthly basis Jay Wright's secretary would match up the deposit from the bank statements, with the receipts and they would put them down in a monthly book.

Now the evidence was clear that if ever there was any question as to what some of the these particular deposits were, that questions would be asked and those matters would be clarified on these books that were kept on a monthly basis by Mr. Wright.

Now every year Mr. Wright would prepare Harry Eugene Claiborne's tax return and the way he prepared them was he would go back to his 12 monthly books and he would put those together and add up the 12 monthly figures for legal fee income and he would come to a total. If there were any questions about the figures in the books at that point they would be cleared up through telephone calls and communications from Mr. Wright to Judge Claiborne and there is no question, ladies and gentlemen, that Mr. Wright was diligent, that he was careful in doing this.

There is ample evidence of calls that he made to Judge Claiborne. Why? Because he was diligently performing his responsibility as an accountant. He was a cautious, careful man. The records that were maintained, you heard Mr. Wright's testimony that those records were carefully maintained by her. Everything that they got from a client because tax matters are important, everything they got related to tax was put in a file which was maintained next to her desk and there is not one shred of evidence in this case that any of those tax records were ever mislaid or lost.

Now as a result of this process using the 12 monthly records plus this process of discussing the income tax returns were filed and that's the regular process that goes on up to the summer of 1978. Okay.

Now what did we hear about the summer of '78? Well, the evidence was quite clear that in the summer of 1978 Judge Claiborne knew or then Harry Eugene Claiborne knew that he was going to be taking the bench in September and at the time he had two lawyers working for them and one secretary.

He had an agreement with the two lawyers, Annette Quintana and James Brown, as to legal fees that they would receive after Judge Claiborne became a Judge which the Judge had something to do with while he was still in the firm and the agreement was that when Quintana and Brown after September of '78 received these legal fees, that they would divide it and split a percentage with Judge Claiborne.

On September 1st, 1978 the evidence is undisputed.

Judge Claiborne took the bench. In the first year after that, the first full tax year in which Judge Claiborne was a Judge was 1979. During that year we know as I've related to you previously that his income was down from these heights of 1977 and 1978 and his expenses were remaining the same.

What happens in this year you can see that this long established practice of 30 years of always depositing checks changes dramatically and the way it changes is Judge Claiborne starts to cash checks.

Now you've seen government's exhibit 42 quite a lot in this trial. Everyone agrees it is absolutely accurate. Now when you consider the evidence in this case, let me suggest that the proper way to consider it and I believe the Judge will instruct you in this regard, the proper way to consider all of this evidence is in light of reason, using your common sense and your experience developed in your everyday transactions, human transactions, and if you look at this government's exhibit 42 in this light I ask you to consider the following things.

Of course government's exhibit 42 speaks for itself. You can see exactly what happened. But consider this. Out of 14 checks of legal fee checks in this year he reported on his 1979 return only two and a half checks, two and a half checks out of 14.

Judge Claiborne admitted from the stand, he knows that cash transactions are easier to conceal than check transactions. Mr. Diaz testified that on the basis of his experience a reasonable inference can be drawn from this part from 30 years of deposits, this part then is sufficient for you to infer an attempt to conceal income.

Consider further, ladies and gentlemen, the rather important, I would say fact, that not a single one of the checks that he cashed in 1977 was reported. Not one. Now what happened in 1980? We've heard and the evidence is uncontradicted of the checks that he received in '79 and what eventually happened to them? Let's look at the process that resulted in the calculation of the income tax return for that year.

That process started in early 1980. Now you will recall that Jay Wright did not have for this year the 12 monthly books. The reason is that Judge Claiborne had ceased providing him deposit information on a monthly basis. So Jay Wright instead of going back as he had for 30 years to the 12 monthly books, he had really no accurate or anything approaching an accurate yearly summary of Judge Clairborne's legal fee income.

What was the next thing that happened? Well, you will recall seeing government's exhibit 28. Let me put that in front of you. Can you all see? I will set it up here. Now government's exhibit 28, it is clear from the evidence that this letter was sent by Judge Claiborne, signed at the bottom, to Jay Wright on the 1st of March, 1980. That is the first document that relates to what eventually becomes an income tax calculation.

What I'm going to do here on this easel is to put down for your benefit when you start organizing the exhibits back in the jury room, this exhibit number, because it is the first exhibit that is relevant to the tax calculation for the tax year 1979, government's exhibit 28.

Government's exhibit 28 has on it, you'll see they wanted a letter from you as to my earnings for three years including 1979 and he says here with the tabulation from my deposit, you will recall the testimony that the clear practice was Jay Wright always identified legal fee income from deposits.

So this was a letter sent to Jay Wright but not for tax purposes. It was information purposes of writing letters to three financial institutions. What was the figure on here? Well, it was 46,371 and I'll round that off, $46,371. But remember, keep this in mind.

This was later revised and it never had more than $22,332 in real legal fees anytime. So although there is a report in government's exhibit of 46,000, as it turns out later there never was more than $22,332 in legal fees in that figure.

What did Jay Wright do with government's exhibit 28 that he got about the first day of March, 1980?

Now he took the figures, he added them up and he came to the conclusion that the figure -- and you'll see that it's actually -- it was originally $45,000 and then changed to 46,000 by Judge Claiborne.

Mr. Wright took the figure and he did exactly what Judge Claiborne asked him to do. He wrote letters which are in government's exhibit 29 to the financial institutions and that, ladies and gentlemen, is the next exhibit in order and I suggest you consider it, government's exhibit 29.

That figure used for 1979, 45,371, that came directly from Judge Clairborne's own report to Jay Wright. Keep in mind, however, that this figure, 45,000, which came from government's exhibit 28, again never had more than what later turned out to be $22,332 in legal fees.

We know from Jay Wright's calendar that on the 8th of April, 1980, Jay Wright started working on a request for an extension of the time to file Judge Clairborne's 1979 income tax return.

The next tax return is due in April of the year and so in the first week of April Jay Wright started working on the request for extension. On the 11th day of April, 1980, these calculations were complete and there is in evidence in the case the documents which Jay Wright used for that estimate and here it is, the next document in order, government's exhibit

30, and what is the figure that Jay Wright has on government's exhibit 30? The same figure, the only figure that he had been told by Judge Claiborne and there it is, $46,371.

Keep in mind again that this figure came from government's 28 and it only has 22,332 in legal fees in it. All right.

On that day, April 11th, Jay Wrighthad , you can see it in government's exhibit 30, the calculations of Judge Clairborne's income tax, estimated income tax and his extension and two checks were obtained from Judge Claiborne, one for $2500, one for $8,000. You can see the checks, they are in evidence, they are sequentially numbered, 0302, 0303.

Received at the same time I suggest, ladies and gentlemen, and the evidence in the case, the contemporaneous records maintained by Jay Wright, his calendars which are in evidence in the case which came in yesterday, indicate that Judge Claiborne came in on that day late in the day of the 11th, Jay Wright's testimony and the reasonable inference, ladies and gentlemen, is that's when Judge Claiborne brought the two checks in for $8,000 and $2500.

That's when the request for extension was finalized and that $46,000 including only $22,000 in legal income is the only notice that Jay Wright had as of the 11th of April.

Judge Claiborne says that on the 11th of April he sent to Jay Wright defense exhibit 1 which disclosed his true legal fees as almost twice that much, as almost twice this 22,000, $41,000, and I submit to you, ladies and gentlemen, when you think about this you will conclude that the only real issue in the 1979 year is whether Jay Wright got defense exhibit 1. That is what it all comes down to, it's very simple.

Did Judge Claiborne really send defense exhibit 1 to him on that day or not and I submit to you as you see as I go through this a little further that there is ample evidence, not just from the testimony of Jay Wright, but ample evidence from contemporaneous records that Jay Wright never got defense exhibit 1.

Let's look at some of that. On the 15th of May and I suggest to you when you go back and start looking at these documents, the next one that's relevant, government's exhibit 40, you will recall, Judge Claiborne like all Federal Judges, he is to report various of his financial transactions to the Judicial Committee of the United States, has to report among other things his fees and on the 15th of May, 1980, dated 15th of May 1980, he reported his legal fees, client fees while in private practice to the Judicial Ethics Committee.

He signed the form, you can see it right there, dated May 15th. Jay Wright had nothing to do with the filing and execution of government's exhibit 40 and what's the figure that Judge Claiborne puts on this government's exhibit 40?

23,050 and some cents.

Now you notice that the report that he filed with the Ethics Committee himself personally only reports about half of his true income for 1979 and I ask you to consider this.

If Harry Claiborne had sent defense exhibit 1, that's the $41,000 notice he says he sent, if he had sent that to Jay Wright on the 11th of April would he have forgotten one-half of his true legal fees in a month? Would you forget, would any of you ladies and gentlemen who might be salaried employees or have an income, would you forget one-half of your salary in a month?

I suggest to you when you consider that in the light of reason, common sense, your own experience, the only conclusion is nobody is going to forget half of his income in one month.

It just doesn't make any sense and it suggests, does it not, that he didn't forget at all. That this is an intentional false statement and it suggests and I think you can reasonably draw the inference that he never told Jay Wright about the 41,000 that he says he did.

Now if Judge Claiborne sent defense exhibit 1 which has his true legal income on it, then why wouldn't he just look at his own carefully maintained regard? Do you remember the little book, the little vinyl book, defense exhibit 47? It has for all of 1979, do you know how many pages are involved? Two pages and one additional entry, very simple. He could review it. He says he maintained it very carefully, kept it in his own residence.

It would take about ten seconds to take a cursory look at those two pages and if he had done that he never would have put $23,500. Doesn't make any sense that since he had the best correct record of what his legal fee income was that he would not have looked at it.

He had it right in his house. If he had looked at it he would have known this figure was wrong. What does that suggest? That suggests that he knew that figure was false. It also suggests that he never sent defense exhibit 1 to Jay Wright.

Now what happened after that? Well, you'll go back to the -- the next exhibit of importance is government's exhibit 29. Again why? Because government's exhibit 29 are the three letters. One of the letters was written early and you'll see that there are two additional letters on the 22nd of May. What does that show?

Well, when he wrote government's exhibit 29, the letters, he knew Jay Wright 46,371 and remember again that figure only contains $22,332 in legal fees in it.

What does that suggest? Well, it clearly suggests, does it not, ladies and gentlemen, that if as of May 22, Jay Wright had known about the $41,000 he wouldn't have used this figure from way back that far. He wouldn't have used the 46,371 figure that only contained 22,332 in legal fees in it.

It also suggests, ladies and gentlemen, that Jay Wright never got defense exhibit 1 because if he'd gotten defense's exhibit 1 he would not have used the old figure.

It also suggests another thing and that is that as of that point, the 22nd of May, 1980, Judge Claiborne and Mr. Wright had not yet started to look at government's exhibit 43 for purposes of doing the analysis which later took place which resulted in a determination that the 46,000 only contained 22,332 in legal fees.

These letters are dated, there's no question at all about the date on which they were written. After that what happens? After that, after the 22nd of May but before the filing of the 1979 return in the middle of June, sometime in that month, and I'd suggest probably the first two weeks of June because if you look at Jay Wright's appointment book you'll see notations in that period of time which shows he's working on Harry Clairborne's returns which are due the 15th of June.

Sometime during that period Harry Claiborne and Jay Wright started to go over the only document that Jay Wright had really that had any kind of details about what Judge Clairborne's legal fees were and that is government's exhibit 28 and I will put revised because here's what they did and the evidence, the documentation is clear on this. They took government's exhibit 28 and they had a conversation.

This is the only real tabulation that Jay Wright had so far and this is in June of 1979. He went over this with Judge Claiborne in the conversation and he very carefully during that conversation talked about which of these figures were really fees and what was something else and they decided that some of these things were not properly legal fees, that they made a notation regarding a plane sale. They made a notation here regarding a certificate of deposit.

They made a notation here regarding interest income, then another notation here as to the $7,000 that was a fee and through this process of discussion Jay Wright determined, and you can calculate the figure from looking at the way they called them here on government's exhibit 28, that he determined that the true fee that Judge Claiborne had received for 1979 was $22,332.

This was arrived at not by Jay Wright doing it himself and I think that's pretty clear. There's no way, ladies and gentlemen, that Jay Wright is going to do this by himself. How would he know that this, one of these figures is a TCD or interest of $622? He'd never know that. How would he know about the sale of a plane unless Judge Claiborne told him?

How would he know about all of these other items? I don't know of which are on defendant's exhibit 1, that's not where it came from. It came from, just as Mr. Wright testified, from a conversation and the only reasonable source of this is from Judge Claiborne. Through that process of discussion about the exact item of legal fee income they arrived at the figure of $22,332.

Now what does that suggest? Well, Judge Claiborne had his own best evidence of what his income was right in his house, defense exhibit 47, which shows he had 41,000, almost twice as much that Judge Claiborne ever told Jay Wright about. Did he ever tell Jay Wright about that? No, he did not.

Did Judge Claiborne go back and look at defense exhibit 1 which he says was sent and he admitted he had copies of it? No, he didn't, apparently because if he had he would have seen 41,000.

He didn't do that and I submit the reason is because defense exhibit 1 didn't exist at that time. Another thing. They are discussing legal fee income here, this is June, and the arrangement that they reached is 22,332. If Judge Claiborne knew, if he really sent defense exhibit 1, that means by Judge Claiborne again, he's again forgotten half of his legal fee again.

I ask you again, ladies and gentlemen, here is another exhibit and if you believe Judge Clairborne's story you're going to have to believe again he forgot one-half of his legal fee income during that period of time.

It is not logical, I submit to you, that anybody is going to forgot one-half of his income. It's not logical when he says he maintains this little book that he wouldn't use it at all because if he'd taken a look at it for five seconds he would have seen that this is a false figure.

I suggest the only reasonable inference is he talked to Jay Wright about it and he intentionally failed to tell Jay Wright about the items when he knew that he'd received, about items which he had taken out and cashed and remember again every single one of those checks that he cashed in 1977 was unreported.

Now Jay Wright also asked during that conversation for additional income and what was the additional income that he was talking about? It was interest income and all kinds of other information. What's the next exhibit that was important? Government's exhibit 31. Government's exhibit 31 is an exhibit which is in Judge Clairborne's own handwriting at about this very same time in which he puts down the figure that he and Jay Wright had arrived at through discussion and a lot of information and figures.

Again this is his own handwriting. He wants you to believe that he's forgotten half of his income when he gave this to Jay Wright. He wants you to believe that he never would have even checked his own records, defense exhibit 47. He wants us to believe that he never would have checked his own record, defense exhibit 1. Doesn't make any sense.

The only logical conclusion is that this figure, government's exhibit 31, which has 22,332, was intentionally false. June 14th and 15th, ladies and gentlemen, the records on Jay Wright's calendar showing that he was working on Judge Clairborne's return.

On the 16th of June the records, the calendar shows that he was still working on it, that he went over it, Judge Claiborne came in that evening. His testimony is from the entry and you can look at the entry, that it means to him Judge Claiborne must have come in that evening to sign the return on June 15th or 16th of 1980.

Now Judge Claiborne says, his testimony from the stand was he signed the return way back in May, not in June but May 2nd. But you will recall on cross-examination I confronted him with a critical and I submit to you a very critical submission. I asked him that question in referring to the 1979 return and that's the tax return which he signed on the 15th of June, 1980. "A. Absolutely". That was his testimony in the previous trial. That's an admission, ladies and gentlemen.

It wasn't made at all, that he signed that knowing what those figures were in the 1979 return. The return is the next exhibit that's important, government's exhibit 3 and government's exhibit 3, guess what it reports? $22,332 in legal fee income. That's one-half of his real legal fees for this year. That was signed under penalty of perjury and, ladies and gentlemen, I'd submit to you and I suggest to you that Judge Hoffman is going to instruct you that from his signature alone which we know by his admission from previous testimony was put on it on the 16th of June, 1980, you can infer that he had knowledge of the contents, that those contents are false, he clearly knew about all this other income.

But we have presented much more evidence than that. All of these documents are consistent with the government's theory of the case. Every one of those documents show that he never -- one time he never, not one time did Judge Claiborne gave Jay Wright a figure that he had for legal fees of more than $22,332 and some cents. That's the proof on the 1979 return. Let's pass on now to 1980.

In 1980 there's no question but that in 1980 Judge Claiborne continued to receive large items of legal fees. There's no question about the fact that he get $42,452 from Peter Echeverria. There's no question about an $888 check. You can see it on the exhibit.

There's no question about a $37,500 from Hochman, Salvin and DeRoy and another check from James Brown, large items of income. Let's look at the $37,500 from Hochman, Salvin and DeRoy.

He took that check out and cashed it. He wants you to believe, ladies and gentlemen, this man with this experience, 30 years of depositing checks, he wants you to believe that he cashed that check for living expenses, for food. I submit to you that that is not reasonable.

At the same time in order to get that check for 37,500 which he took out and cashed, he told the executor for Sid Wyman's estate that he was desperate for money in his own handwriting. Shortly before the 1980 return came due you remember Jay Wright, even he had no documents for the year, he starts calling Judge Claiborne, a man with whom he had done business for 30 years. He calls Judge Claiborne. Judge Claiborne never answered his calls. Is that normal? Is that normal after 30 years that you would not even answer a man's calls?

Judge Claiborne admits that he did not return the phone calls, did not even return the phone calls. Judy Ahlstrom, Judge Clairborne's law secretary, came in and said she threw the notes away, Jay Wright's notes. Do you think that's reasonable? Do you think that a secretary for a United States District Court Judge would take it upon herself to throw those notes away? I don't think it's reasonable and when you evaluate these things in the light of your experiences I think you'll come to the same conclusion.

Now what happened? At the same time Judge Claiborne was not returning calls from Jay Wright there's evidence that he started talking with Jerry Watson. Let me ask you when you think about this critical change from Wright to Watson, ask yourselves some questions.

Why would Judge Claiborne drop Jay Wright for Jerry Watson unless he thought he was going to get something big out of it? Why would Judge Claiborne pay $2,000 for that ridiculous 1980 tax return when he had been paying Judge right $600 a year for income tax returns and all that other stuff? Why would he pay more than three times as much unless he thought and knew he was going to get something out of it?

Why would a lawyer -- we're not talking about just any average citizen, ladies and gentlemen. We're talking about a lawyer who makes his career for 30 years of asking questions in cross-examining people, of carefully evaluating facts, why would a man like Judge Claiborne with his experience, with his background leave Wright and go to Watson without ever asking a question about his professional qualifications unless he didn't want to know?

Why wouldn't the name Creative Tax Planning start ringing a bell? I suggest to you when you think about these things the answer is because it's consistent with the fact that Judge Claiborne knew that that 1980 return was going to contain false information.

He was aware from the very beginning, I submit to you, ladies and gentlemen, that that return was going to result in a false statement of his income.

Now did Judge Claiborne know what Jerry Watson was doing? Yes, indeed, he did. If you look at government's exhibit 46, which is a letter from Jerry Watson to Judge Claiborne. You will see that in the third paragraph of that letter, Jerry Watson told him perfectly well what he was going to do, he was contemplating putting legal fee income into some capital gains transaction.

You know that Judge Claiborne knew about the capital gains transactions. I submit to you that Judge Claiborne knew that was wrong from the receipt of that letter in April of 1981.

Judge Claiborne has been reporting his legal fee income for 30 years on Schedule C. He admits he knows what capital gains transactions are and you will be instructed by Judge Hoffman that it's a principle of tax law that legal fees are never capital assets, they are always ordinary income. Judge Claiborne knew that.

On April 13th while these discussions are going on with Jerry Watson you will see that Judge Claiborne prepares on his own another extension for time to report his income for 1980. You'll see that extension in his own handwriting. There's no signature of any preparer, his own handwriting. That is the original and on that form Judge Claiborne states that the total tax he expects to report for 1980 is $42,000.

Now we know Jerry Watson is working on putting legal fees into some capital gains transactions and we know Judge Claiborne realizes that if he reports his legal fees correctly he's going to have a substantial income tax liability, a substantial payment to make of $42,000.

He knows what's going on with Watson and he knows the problems, the $42,000 liability he's going to incur if he reports that correctly.

What happens after that? Well, of course, I might comment a little bit further on this government's exhibit 4. Judge Clairborne's testimony is that he didn't prepare it, that Jerry Watson prepared it.

But on cross-examination I asked him this question from a previous procedure.

"Q. You you filed an extension in which you estimated your income tax liability to be $42,847?

A. On that prior occasion, I did, yes."

Inconsistent testimony in this trial, clearly inconsistent on an important matter. After April 13th, according to Mr. Watson, he had a number of additional discussions. That shows what Judge Claiborne knew what was going on. Maybe you remember this incident. Mr. Watson said that the number of discussions he had was between three and six and he couldn't remember exactly how many.

Judge Hoffman asked him wouldn't it be either four or five if it was between three and six and he answered yes.

So we know that Mr. Watson had by his own statement on the stand had four or five additional discussions with Judge Claiborne in which they discussed this income tax return, another proof that Judge Claiborne knew what was in the 1980 return. Four or five discussions.

Next we come to the finished return for 1980. What does it look like? I ask you ladies and gentlemen to look at that 1980 and consider it in the light of your own experience. Consider it in the light of what you would do and then think about it in the light of what Judge Claiborne would likely have done and a man of his experience, that return, not just a capital gains figures in pencil, the whole thing is written in pencil, scribbled in pencil.

There is no schedule income on that return. It reported a capital gains transaction which Judge Claiborne knew perfectly well that those legal fees were going in there and the bottom line liability was $1,000, not the $42,000 which Judge Claiborne had estimated itself.

It had gone down from $42,000 to $1,000 liability. Now how many of you ladies and gentlemen when you file your own returns aren't interested in the bottom line? Would Judge Claiborne not have been interested in the fact that his estimated income tax liability went down by 93 percent? I submit to you clearly that that is one of the things that he knew. One of the things he was aware have, knowledgeable about and one of things he wanted to do was understate his income for that year.

Now Judge Claiborne admits that he went to Watson's office to sign that return. But he says that the only person there at the time was one Peggy, that's what he said on direct. On cross I asked him, do you recall was that Peggy Kotecki and he readily agreed, yes, that's the person, Peggy Kotecki. Now remember that incident and you know, we all know that Peggy Kotecki didn't work there until a year later. She didn't work there at the time and there wasn't any other Peggy there.

Judge Claiborne had to go over that return with someone and that someone was Jerry Watson and that's exactly what Jerry Watson testified to, that he went over that return for ten to 15 minutes and you recall him saying, ladies and gentlemen, that he could explain a return to anybody in ten or 15 minutes.

You look at that return for ten or 15 minutes and you'll see how absurd that thing is. You'll see that no one with Judge Claiborne's knowledge would sign that return believing it to be a legitimate reporting of his income tax return for that year, believing it to contain a true statement. Quite the contrary.

The other inference is he knew it only contained false statements. Finally on cross-examination of Judge Claiborne he admitted that on a prior occasion he had testified that Mr. Watson was present when he signed the return. As to 1980, ladies and gentlemen, the evidence, I submit to you, is beyond any reasonable doubt. The only evidence of any sort, testimony or document that's inconsistent in any way with the government's contention is Judge Clairborne's testimony here and even that has been contradicted by admissions he made at a prior trial.

There's no question about 1980. We have proved that he signed that return, he knew what was on it and he knew that it knowingly contained false information.

Now this is not a matter, this case, the 1980 return, is no matter of neglect or carelessness. Quite the contrary. We know he had discussions with Watson, we know he had signed it after knowing what was on it, we know that it had some scribbled Schedule D there, we know that it contained no Schedule C after 30 years.

We know there was a drop of 93 percent of his income tax liability. We know he paid $2,000 for this ridiculous return when he'd been paying $600 for 30 years. He never signed. Don't you think the first time you sign a new income tax return if you're a Federal District Court Judge after 30 years you go to a new person, you're going to look at that return? I believe you are and he knew what was in that return and his story that he didn't know what was in it, the first return he'd ever signed with this man at Creative Tax Planning, that story, ladies and gentlemen, does not deserve your good faith belief in light of your experience, in light of any common, reasonable sense approach to this matter.

All of these things that I've mentioned to you are red flags. Many, many red flags. A man like Judge Claiborne must have been aware, at a minimum must have been aware of an extremely high probability, if not a certainty, ladies and gentlemen, that that return contained false information and I submit the evidence is very clear that he deliberately filed that return knowing that it was false.

Now the final transaction, the $75,000 transaction, let's go back to 1978. We go back to that period. During that period we knew Jay Wright was keeping his books in the normal course. The testimony and the documents are consistent that sometime in September of 1978, Jay Wright's secretary saw a deposit for $75,000 on August 31st but she didn't see any corresponding receipt or any other document for it.

So she questioned it and she looked in the book, government's exhibit 22, and you'll see that she put it in the book as, quote, "other than legal fees". She didn't know what it was and it stayed like that until early 1979 by Jay Wright's testimony, by the documents which I will mention in just a second.

When Jay Wright was preparing the 1978 returns he came across this thing and like he always did, he called Judge Claiborne and asked him what that was. And Judge Claiborne said to him it was a loan that was used to pay his 1977 income tax liability.

That is exactly what Jay Wright put down. Let me put that in front of you here, government's exhibit 25, and notice this is a contemporaneous notation made by Jay Wright at this time.

It says, "Note income borrowed to pay tax for 1977", and it has a notation, loan. Now we know that Jay Wright and there's no evidence to the contrary, he is a careful person, he is an accountant, he doesn't just throw records like that away.

Loan is an important word in the accounting business. He doesn't put the word loan down unless that's exactly what Judge Claiborne told him.

What possible reason would he have for putting down anything other than exactly what Judge Claiborne told him? So he put this down, loan.

That's the admission from Judge Claiborne coming through Wright and putting down by Wright that this $75,000 is a loan. Okay.

What corroboration exists for that fact? Well, there's a lot of cooroboration for this as being a true and correct entry.

We know that Judge Claiborne signed his '77 return and filed them in June of 1978 and at the time he owed $74,000 in taxes. We know that on the 31st and you can see the deposit slip, he deposited this $75,000 in a bank. There's no question about that.

We know on the same day he wrote a check to the IRS for $76.443.16 to the IRS and there wasn't enough money in the account to pay that check unless the $75,000 had been put there.

So it's very clear that when Jay wrote "Borrowed to pay tax for '77", we know for an absolute certainty that this part of it to pay tax for 1977 is totally corroborated, absolutely corroborated by the documents. There's no doubt about it and since this part is absolutely correct, not one bit of error, you are reasonably entitled to draw the inference I think, ladies and gentlemen, that the rest of it is also correct, that Jay Wright didn't make any mistake here. He didn't make any mistake in the rest of his books.

This entry is correct and corroborated, this loan entry in light of this and in light of what you know about Jay Wright's business practices, you are entitled to conclude that that's an accurate entry and that that's what happened.

Now later in 1979 Judge Claiborne had an obligation to file one of these reports with the Ethics in Government, the Ethics Committee being the Judicial Ethics Committee regarding his transactions. You recall the testimony of Judge Decker from Chicago. He talked about how important these reports are because they are intended to promote honesty to eliminate conflicts of interest and to inform the public of possible financial transactions involving the people that occupy the very important positions of United States District Court Judges.

Judge Decker testified that these reports are publicly available so the citizens can come and look at them and determine for themselves whether there are any financial conflicts, anything that they should know about, not to evaluate, but be aware of the activities of the people holding these high positions of trust.

Now there's no doubt about the fact, ladies and gentlemen, Judy Ahlstrom admits that she prepared the Judge's financial statement that year, government's exhibit 49. Judge Claiborne signed it and submitted it on the 20 of June of 1979 and on that report for the year 1978 he had to report his loans among other things for 1978.

He reported no loans in 1978. We submit to you the evidence on the basis of this admission, this careful admission, this careful statement here of loan by Jay Wright, the fact that a large part of this thing is fully corroborated, plus the nature of that deposit, $75,000 in 100 dollar bills. That's the kind of transaction, that's the kind of loan that you remember.

That's the kind of thing that supports the contention that when Judge Claiborne signed the '79 figure that was due to the Judicial Ethics Committee in 1979, that that statement that he had no loans when just a few months before he had discussed this $75,000 loan with Jay Wright, that that statement was intentionally false.

We also demonstrated through Judge Decker as required for an element of the offense that it was within the jurisdiction of the Judicial Ethics Committee and there's no question about the fact, you heard Judge Decker's testimony of how important these figures are and how seriously Judge Decker and the committee takes these matters.

Now let's take a look at Judge Clairborne's contention as to this transaction. In fairness I should discuss that and I will. Judge Claiborne says that this figure, that in 1972 he got a loan from Sid Wyman, that he had put the money in a safe deposit box in Ted Binion's at the Horseshoe. He says he withdrew it on the 31st and that he told Wright about it that day, on the 31st, and Jay Wright simply misunderstood it.

Well, let's look at that, ladies and gentlemen. We don't dispute. We don't dispute that there was a gift from Sid Wyman in '72, we don't dispute that at all. But we certainly dispute the fact that that $1,000 gift is the same money that shows up in '78. That we dispute.

We know that Judge Claiborne had bank accounts in banking institutions in the middle of Las Vegas. It would be convenient, would it not, to put that $75,000 in there? That was his normal practice. That would have generated a record. But this transaction according to Judge Clairborne's version, no such record, no deposit in the bank. Isn't that unusual? It's also consistent with the fact that that money was not around for that six year period.

It's consistent with the fact and the government's contention that that indeed was a loan which first took place in '78, not way back in '72.

Now Judge Claiborne we know was a careful person and he had by his own admission certificates of deposit in a number of financial institutions. He admitted to Nevada Savings and Loan, Nevada Savings Association and other certificates of deposit. He knew the importance of putting money in interest accruing accounts.

You heard Mr. Stathos, the banker, yesterday testify that if this money, if it was sitting around for six years it would have earned something between 34,000 and $37,000 in interest. Is it logical that a person would leave that money for six years? I'm not talking about a few months, six years and just forget about possibly $37,000 in interest? No, it's not reasonable in the light of common experience and that lack of reason is consistent, is it not, ladies and gentlemen, consistent with the fact that that money was not there for six years.

What really happened was it was a loan in 1978 to pay his income tax return.

Now if Judge Clairborne's story is correct, again we have no receipt for the Horseshoe. There's no documentation according to Ted Binion, there's no insurance and, of course, there's no interest. There's no record of any sort there's no corroboration for his story of any sort except the word of Ted Binion.

Even the Horseshoe by Ted Binion's admission, the Horseshoe says he has customers, thousands of customers that come in and they put money on deposit with the Horseshoe and what happens in the normal course when people put money in the Horseshoe or any other casino? They get a receipt. But not in this case.

I submit to you that that is consistent with the government's contention that the money wasn't there, that the money was, in fact, a loan just as Judge Claiborne told Mr. Wright. If he had the money in the casino, ladies and gentlemen, back in June, why wouldn't he have paid his income tax liability of $74,000 in June? I think the reasonable answer is he would have.

Instead he wants you to believe that he waited from

June until August 31 and incurred another $2,000 in interest when he had the money all along. Is that reasonable? I submit to you that's not reasonable. The most reasonable inference is the money wasn't there. The most reasonable thing is that Jay Wright's entry, the contemporaneous entry here is correct.

He wouldn't have left the money there if he could have walked down and paid it off, another $2,000.

Now I suggest to you and I don't mean to say that there is any evidence as to this, but I think that you can infer that something like this probably happened.

I think that what happened was there was a loan just as these people -- there was, excuse me, a gift in 1972 and just as Mr. Wyman wanted, sometime shortly after that that money was disposed of, Judge Claiborne, then Mr. Claiborne, used the money I submit to you on himself just as Mr. Wyman had wanted him to and I suggest to you that just before Judge Claiborne took the bench on September 1st that he wanted to clear up his tax liability and I submit to you that he went out and he got a loan from some friend, $75,000, and he deposited that money and he used it to pay his income tax return and the reason why there are no documents I submit to you would be consistent with the fact that it was a loan made by a friend, a handshake, no documents.

I submit to you that the reason why it wasn't reported, the reason it was reported incorrectly, falsely on his return is because the existence of that loan might have been embarassing if the name of that person and the nature of that loan might have been known.

It might have been a matter, ladies and gentlemen, I submit, it might very well have been a matter which would have shown possibly conflict of interest or some embarassment to Judge Claiborne and I submit that's the most likely story by far as to what happened here.

By far all of the evidence and all of the common sense suggests that this entry by Judge Clairborne's admission to Jay Wright is absolutely correct and that Judge Clairborne's story when you think about all the factors, it just doesn't make sense.

Now in closing I told you at the beginning that this case really is about false signatures, false statements, not complicated. It's fundamental human relationships and fundamental intentional false statements, false statements to Mr. Wright, false statements to the IRS and false statements to the Judicial Ethics Committee, false statements in this very courtroom about Peggy Kotecki.

Is there any doubt in your mind that that statement was false? That's what this case is about and I submit when you think about it and you fully go through the exhibits for '79, I suggest that you may want to consider organizing your exhibits in this fashion, that you will come to the conclusion that the government has met its burden and demonstrated beyond a reasonable doubt that Judge Claiborne violated the statute and admits the crimes with which he is charged in this indictment. Thank you very much, I appreciate your attention.

THE COURT: You used up an hour and four minutes. Ladies and gentlemen of the jury, you may take a ten minute recess at this time.

Ten minute break, gentlemen.

(A short recess was taken.)

THE COURT: All are present. Call the jury, Mr. Marshall. All jurors are present. You may proceed, Mr. Johnston.

MR. JOHNSTON: Thank you, your Honor. May it please the Court, ladies and gentlemen of the jury, I want to say first that you've been a very patient and attentive jury, all of us appreciate that. I think we recognize that serving on a jury in a case like this involves at the very least a good deal of personal inconvenience and might very well involve some hardship and we are appreciative of that.

When Judge Hoffman instructs you on the law to be applied in this case, the law that you are required to apply to the facts as you determine them, he will tell you that Judge Claiborne comes into this courtroom and into this trial with a presumption of innocence, he's presumed to be innocent at all times all the wav through the trial and that presumption is dispelled only if the government proves that he is guilty beyond a reasonable doubt. The burden of proof rests on the government not on Judge Claiborne.

It's not sufficient if you have some uncertainty as to whether Judge Claiborne is innocent. It's not up to Judge Claiborne or his lawyers to prove to you that the Judge is innocent. It's up to the government to prove to you that he is guilty.

I want to say also that even if the burden were on the defendant in this case to prove his innocence, we feel that the evidence that's been presented would meet that burden. Mr. Hendricks suggested to you a number of times that based on the evidence presented by the government you're entitled to draw a certain inference or you may infer certain facts from evidence that's been presented or that the most likely inference to be drawn is in favor of the prosecution's theory of the case.

The question is not whether you're entitled to draw certain inferences that might be damaging to Judge Claiborne; the question is whether you're going to be convinced beyond any reasonable doubt of his guilt.

I want you to keep that in mind throughout the argument and later when you retire to deliberate and consider your verdict. Lawyers who represent defendants in this kind of case always have a nagging fear that subconsciously no matter what the Judge instructs the jury or what the attorneys say to the jury, that somehow there's a feeling in the jury's mind that it's really up to the defendant to prove his innocence.

If I don't depart any other information to you this morning I'd like to bear down on that one. Lawyers for the defense are going to divide the argument. As Judge Hoffman has told you, my assignment is to review with you the evidence on the two tax counts. Those are the counts that relate to the tax returns for 1979 and 1980.

When Mr. Goodman made the opening statement in the case he said to you that his purpose was to provide a kind of road map so it would help you in following the evidence as it came in and that's what he did. My purpose is similar. Now that the evidence is all in, all the documents have been received, you've heard all witnesses, I want to provide a road map to guide you through the evidence that you will be considering when you retire to the jury room. Even though I might be tempted time is a prescious commodity at this point and I'm going to abandon any idea of flights of rhetoric and deal strictly with the evidence in the case.

I refer you first so that we don't forget it it to Mr. Gologorsky's charts that are in evidence and which you were able to view while he was testifying will be helpful to you but these are prepared after all the evidence was in.

Mr. Diaz' testimony came only after the conclusion of the Government's evidence. He didn't take the stand again. We heard nothing from him that related in any way to the evidence presented by the defense in the case.

Preliminarily let me say to you and I think it's already clear there's no disagreement about the amount of fees from his private practice that Judge Claiborne received in 1979 and 1980. If you look at Mr. Gologorsky's schedule you'll see the same fees listed as you will find on the more modest charts that the government has introduced through Mr. Diaz so that's not an issue.

I'm going to talk about a number of exhibits as I try to lead you through the testimony that relates to the 1979 return and I'm going to spend much more time on tha return than I am on the 1980 return because there are many more documents, the facts are more difficult to assemble and get in order. If any of you are taking notes at this time, I would suggest to you that instead of getting bogged down in the dozens of exhibits that have been received in evidence in this case, with respect to the year 1979 you focus primarily on five exhibits and I'll tell you what they are and I'm going to talk about them as I go along.

The first is defense exhibit 47 which is Judge Claiborne's book in which he recorded the fees that he received. The second is defendant's exhibit one which is the letter from Judge Claiborne to Jay Wright dated 4-11-80. I'm not going to bring that up here because I want to talk about that in a moment. The third is the $8,000 check that was sent in with the application for extension of time to file a 1979 your Honor.

That's defendant's exhibit 4, the fourth exhibit that I suggest you focus on actively is the application for extension of time that was prepared by Mr. Wright. That's Government's Exhibit 30. Now in that file, exhibit, that particular exhibit you'll find the work sheet that was prepared by Mr. Wright or someone in his office to calculate the amount of estimated income for '79 because a check had to be sent in with the application.

You'll find the April indication itself, you'll find the form W-2 for the Judge, his earnings and the amount that had been deducted from those, withheld from those earnings in '79 and also you'll find a picture of the $2500 check that was mailed in as the first quarterly payment on the declaration of estimated tax for year 1980.

Finally the fifth exhibit that I'd like you to pay particular attention to is Judge Claiborne's list of income and expenses which was prepared on May 1, 1980 during a telephone conversation with Mr. Wright.
I think that one is over here and you'll have it in any case in the jury room.

We have a blowup of the first page of that. The exhibit itself is Government's exhibit 31. Now having said that let me go back and I want to try to trace with you if I may the evidence that develops a sequence of events, a chronology of events that have to do with the 1979 return.

The first date is March 1, 1980 and I note that Mr. Hendricks accepted Judge Claiborne's testimony that the letter which is undated itself which was written by Judge Claiborne to Mr. Wright asking him to write a letter to Stanwell was actually written on March 1, 1980. We know that it must have been written sometime shortly before March 7th because that's the date on which Mr. Wright wrote to Stanwell Mortgage Company.

That letter from Judge Claiborne to Mr. Wright is Government's Exhibits 28 and that's the letter that lists the bank deposits that Judge Claiborne thought represented fees and which were later analyzed by Mr. Wright and determined some of them not to constitute fees. So on March 7, 1980 Mr. Wright wrote to the Stanwell Mortgage Company, you've seen the letter and in that letter he told them that the Judge's fees for the year 1979 were $45,371 And he had evidently totaled the numbers on the March 1 letter himself and realized that the Judge made a $1,000 mistake and in that letter he corrected and it gave the correct total for the items that were listed in the Judge's letter.

That letter to Stanwell Mortgage is part of Government's exhibit 21 which also includes the other two letters, identical in text that were written later on May 22. Now I'm pleased, really, that Mr. Hendricks told you that the only true issue with respect to 1979 is whether Jay Wright received the 4-11-80 letter from Judge Claiborne. That's defendant's exhibit 1 and I propped it up against the lecturn here so you might see it again.

In that letter Judge Claiborne gave Mr. Wright an accurate total of the fees which he's received in 1979 and you will recall his testimony that as he received fees he recorded them on little slips of paper which he then put into an envelope and then at some later date he would sit down and enter those fees in the book which he maintained for the purpose of keeping a record of fees received.

His testimony was that he wrote the letter dated March 11, 1980, he wrote an $8,000 check which bears the same date which is in evidence as defendants exhibit 4. Either he or Judy Ahlstrom retrieved the form W-2 which they had in the office and enclosed the $8,000 check that they had with the billing and Judy Ahlstrom had carried it to Mr. Wright's office and deliver it to his secretary who also happens to be his wife.

That testimony is uncontradicted except Mr. Wright and Mrs. Wright say they have no recollection of seeing the letter and they didn't find it. Mr. Wright on that day worked up a computation of the estimated income for 1979 and he prepared the application for an extension of time to file a return. You have his work papers in evidence.

On that work paper he calculated that the estimated balance of tax that was going to be owing for 1979 was some $16,000 and that the first quarterly payment that should be made with the estimate for 1980 was $4,000. You do recall those numbers were written down on the lower right-hand side of his work sheet.

But then for some inexplicable reason he told Judge Claiborne to send him a check for $8,000 which is just half of the figure he calculated would be owing and to send them a second check for $2500 to go in with the estimate, although he'd previously shown on his work sheet that it would require $4,000.

Now Mr. Wright had received with the letter the W-2 and the $8,000 check, he still didn't have a $2500 check to go in with the estimate and he had to have Judge Claiborne sign the application so he called Judge Claiborne, told him to come down and bring a check for $2500 which Judge Claiborne did. That check also is dated 4-11-80. He delivered the checks and while he was in Mr. Wright's office he signed the application for an extension of time.

While he was there he saw this 4-11-80 letter on Mr. Wright's desk, he saw it there physically. And that letter correctly states the Judge's total income from fees for the year 1979, it's a critical piece of evidence, perhaps the most important piece of evidence in this entire trial.

On May 1st, 1980, Judge Claiborne testified he received a telephone call from Judge Browning who is is a Chief Judge for Ninth Circuit Court of Appeals in San Francisco and is, in fact, Judge Claiborne's boss and Judge Browing asked him if he would go to Los Angeles to conduct a trial down there. Judge Claiborne thought this would be a lengthy trial and he was afraid that he would still be out of town when the return would have to be filed so on June 15th.

The extension is an automatic extension which extended it from April 15th to June 15th. So he called Mr. Wright and they discussed whether they should apply for an additional extension which would extend the time still further and they decided not to do that. Mr. Wright suggested to him they could handle the matter the same way they had last year which meant having the Judge sign a return in blank which Mr. Wright would fill in the information that he had and which he would file.

So in order to accomplish that they had a telephone conversation and Mr. Wright went over with Judge Claiborne all the items that he would need for the 1979 return and we have a blowup of the first page of that, Government's Exhibit 31. Now you heard Judge Claiborne's testimony that Mr. Wright said to him first, what is your salary, your Honor wages he called it for the year. Judge Claiborne said you have that figure, you've got the W-2.

So Mr. Wright left the telephone briefly and came back and he read the figure off to Judge Claiborne, the $34,409 and Judge Claiborne wrote that down. He was working on a sheet at his end of the telephone call. Mr. Wright then said to him what was your income from fees that you received in 1979 and Judge Claiborne said again you have that figure, I sent that to you.

And he's referring to the 4-11-80 letter. So Mr. Wright again left the telephone and he came back with the figure of $22,332 and Judge Claiborne wrote that down on the sheet.

Now there's no question that it was Mr. Wright and not Judge Clairborne who computed that figure. Mr. Wright even admitted that and he worked it up on an adding machine and he had an adding machine tape for it. So he acknowledged very clearly that Judge Claiborne had to get that figure from him and that's exactly what happened on that occasion on the sheet where Mr. Wright analyzed the bank deposits.

That Judge Claiborne had listed in his undated letter which we now know was written on about March 1st. There is a notation and this has been pointed out previously in the course of the trial, plane cost, $11,000. I suggest to you that the obvious source of that information was the 4-11-80 letter which contains the same information. There's not another document in evidence that shows a plane cost of $11,000 on the sheets which Judge Claiborne went ahead and completed of which this is only the first page. You will have the whole set in evidence.

He's noted that the plane cost $11,500 which is a different figure. This is the best objective evidence in the case that Mr. Wright had the 4-11-80 letter, that he made use of it when he entered that plane cost on that letter he previously received from Judge Claiborne.

Mr. Wright claims that the analysis of the bank deposits was really made by Judge Claiborne. I'm talking now about this analysis that appears over here on this side of this sheet. Judge Claiborne denies this but isn't it significant that Mr. Wright was unable to find any entry in his log which he initially said included all the time that he spent, all the conference and telephone conversations that you had with clients.

He couldn't identify a single entry where he was getting that information from Judge Claiborne either over the telephone or in person. Now we continue with the chronology that I've constructed to try to lead you through the areas of events through the 1979 return. Judge Claiborne's testimony is very clear that he had the telephone call from Judge Browning on May the 1st, 1980.

He talked to Mr. Wright on that date, he made this up, went over all the items that were going to be needed for the return, the items of income and the deductions. The Judge is sitting there writing as he talked with Mr. Wright, that he later filled in the numbers that he didn't have right at hand and that he took that sheet over to Mr. Wright and he signed a 1979 return in blank on the following day, that was May the 2nd, not June 15th or 16th but May the 2nd. He dated the return 6-15-80 because that's the day on which the extension of time to file the return expired and he understood that it had to be filed by that date.

Now on May 14, 1980 Judge Claiborne signed his financial disclosure report for the year 1979 that shows fees in '77 of $29,050 and you heard his testimony that he had worked from the $22,332 figure that Mr. Wright had given him and he came upon a check or some item in addition to that that he thought should be included, added it to the

22,000 and came up with a $23,000 figure.

Mr. Hendricks has told you that the $22,332 figure was not completed until after May 22, 1980 and he says that because that's the date on which Mr. Wright wrote to the bank and the savings and loan association and he used the same $45,000 figure that he'd used in the March 7 letter to Stanwell Mortgage. But the financial disclosure reported a date of May 14. That's prior to the time when Mr. Wright wrote those other two and also doesn't that establish pretty clearly that the $22,332 figure had been included prior to May 14th?

That's the only explanation we have of this $23,000 figure that Judge Claiborne put in the financial disclosure report. What actually happened is this. I suggest that this is the only reasonable conclusion you can draw from the evidence.

When Judge Claiborne called Mr. Wright and asked him to write two additional letters, one to International Bank and one to First Western Savings and Loan, Mr. Wright simply said to his secretary, who is also his wife, just sent them the same letter that we sent to Stanwell and you'll see Mrs. Wright's initials typed at the bottom of the second or third letters.

It's quite clear that she typed them and what they did was just to go back in the file, dig up the copy of the letter to Stanwell and the two letters to the bank and savings and loan association are identical, word for word with the Stanwell letter.

So Mr. Hendricks thinks that it's incredible that Judge Claiborne should have had a copy of the 4-11-80 letter in his file and had his book and still have accepted the $22,000 figure from Mr. Wright. I suggest to you that when Mr. Wright wrote the two letters on May 22 he already had the analysis of the bank deposits which he had totaled at 22,000, he failed to look at that obviously and he sends out two more letters that contain the $45,000 figure. Mr. Wright's log which is in evidence, Government's exhibit 47, I believe.

I have it here, I'm sorry that's the wrong number, put in evidence at the end of the trial. Mr. Wright's log indicates that he was still working on the 1979 return on June 16th, 1980. In his log he records two and three-quarters hours of work on that return on June 16th. He mailed the return that evening and it's received in Ogden at the IRS service center the following day. If the return was dated by Judge Claiborne June 15th, Judge Claiborne had come in and signed the return on the 16th, is it likely that he would have dated it the 15th?

I suggest to you that it's totally unlikely, there would be no reason to backdate the return if he's signing it on the 16th and the fact is that he had signed it back on May the 2nd, he had dated it June 15th at that time because that's when he knew it had to be filled and he had nc contact with that return after that date. Mr.

Wright's testimony was very clear. In the 30 years he was serving Judge Claiborne he had never sat down with Judge Claiborne to go over a return after it was prepared. They never did that, it wasn't their practice and it never happened.

I want to make these comments now, having led you through the sequence of events about the 1979 return. I should have an item of time while I'm doing this. All right. The problem that the prosecution poses is primarily how could Judge Claiborne have accepted a $22,000 figure from Mr. Wright if he had in his file a copy of a letter which he himself had written which gives a correct figure of $41,000 and he also has a book or slips of paper on which he's recorded these fees.

The answer is that Judge Claiborne simply doesn't carry these figures in his mind. He's not a person who retains these numbers, he works with them as they are presented to them. He accepted the $22,000 figure from Mr. Wright without checking on anything, he was negligent in not doing so.

It was a careless thing to do. Judge Hoffman will instruct you, I'm sure that that's not sufficient to prove the prosecution's case simply to conclude that Judge Claiborne was careless or that he was negligent or even that he was grossly negligent. That's not willfulness and the government has to prove that Judge Claiborne willfully, intentionally filed a return which he knew to be false in order to sustain the prosecution's burden of proof. The government's case really rests on Mr. Wright's testimony. He's the government's principal witness for the year 1979.

I don't want to be unkind to Mr. Wright but I want to suggest to you that he's a pathetic figure at this point. He doesn't really remember anything. On direct examination when he's being taken through his testimony by government counsel time after time after time he says that things happened, that statements were made, that conversations were had, that Judge Claiborne gave him information, he has no present recollection of any of those things and I want to read to you from the transcript, when I questioned him on recross-examination.

After he'd been examined, cross-examined, redirect, I came back, I asked him one question. I said,

"Q. Mr. Wright, you testified in answer to some of Mr. Shaw's questions as well as other questions eariler in your testimony about numerous things that Judge Claiborne told you or informed you that you got from Judge Claiborne.

Would it be fair to say that as you sit there at this moment you have no present recollection in your mind of any of these specific conversations?

A. That's true."

I want to point out to you that Mr. Wright told us that in preparation for his very brief testimony in the government's government's rebuttal case which you heard yesterday and shouldn't have taken more than 15 minutes I would think on direct examination, he spent some seven hours and 20 minutes with Mr. Shaw and Mr. Skelton on Monday night, Tuesday and yesterday morning going over that testimony.

They spent over seven hours with him to try to get the testimony that they wanted from him in a very brief appearance as part of their rebuttal case. He testified earlier in the trial that he spent something like 100 hours in preparation for this trial and perhaps the preceding trial.

Only a couple of those hours were spent with Judge Claiborne's attorneys. All the rest of it was the government people. In order to find Judge Claiborne guilty on Count V which is the 1980 return, you would have to find that he was keeping the book the government now doesn't claim that the book is a forgery, very difficult to do this when we find that the government's expert examined it and we discovered that it was a book that was on the market in 1975 and/or 1976, they are able to, with the apparatus that they have, to find a price tag which was a 1975 price for the book, some pens using 11 different inks were used in making entries in the book.

There can be no question about the genuineness of the book. You really think that he kept the book in order to underreport his income and try to cheat on his taxes?

You would have to believe that the April 11th, '80 letter which as I've said is the most critical piece of evidence in this case is a complete forgery, that it was made up after the fact and very cleverly fitted in with the check and the $2500 check and the date on the application for extension.

You would have to believe that Judge Claiborne and his secretary, Judy Ahlstrom both purjured themselves completely under oath in this trial on the stand and you would have to about believe that Wright's testimony is completely truthful and convincing and I suggest to you that no reasonable person would reach those conclusions.

Now as to to 1980. There are only three exhibits that are of primary significance here. I'll just give you the numbers again so you can jot them down. I suggest you focus on these. Defendant's exhibit 41 is a yellow sheet so called which Judge Claiborne prepared and gave to Mr. Watson for the purpose of preparing the 1980 return and the critical number on that sheet, of course, is on the top sheet. It's the figure of $88,500 for fees that were received in 1980.

It developed that that figure is actually a little high. The correct total agreed upon by both the prosecution and the defense was $87,911, about a $600 difference. The next exhibit is the return itself which is Government's Exhibit 5 and finally we have defendant's exhibit 2 which is the 1980 financial disclosure report filed by Judge Claiborne.

The only real issue as to 1980 is whether Judge Claiborne gave Mr. Watson the yellow sheets, whether they were relied upon by Mr. Watson or someone in his office in preparing the 1980 return and whether the Judge believed that the return was properly prepared when he signed it. Whether Mr. Watson or his office should have reported legal fees as ordinary income on Schedule 2, whether treating them somehow in connection with a capital loss on Schedule D is not the issue in the case.

We hold no grief for the way Mr. Watson prepared that return or the manner in which he used the information about legal fees. Judge Hoffman will instruct you, I believe, that legal fees received in 1980 or any other year should have been reported as ordinary income on Schedule C. This is not a matter on which Judge Claiborne is knowledgeable. You observed Mr. Watson on the stand, you heard him testify, he's a rather impressive person and he talks with a good deal of authority about these matters.

Judge Claiborne didn't know at the time that he went to him or when the return was prepared that Mr. Watson has not actually an accountant but he had people in his office who have accounting training and who actually prepare tax returns. I suggest to you that in addition to the Judge's testimony and Mr. Watson's testimony, there is tangible documentary evidence that Mr. Watson's office had the yellow sheets with the $88,500 figure on it.

There are two in evidence. First there's a notation on the yellow sheet itself, on the first page. When you examine it carefully you'll see an asterisk up near the 88,500 and then there's a foot note down at the bottom which is labeled number 5 with a circle and the foot note related to that and it shows that there was discussion going on or consideration being given as to how that $88,000 in fees should be recorded.

If you compare the yellow sheets with the return you will find item by item that the other items of income and expenses that are listed in the yellow sheets are in the tax return. The tax return was clearly prepared on the basis of the yellow sheets, you can match them up item for item and that's pretty good evidence, I suggest, that they had the yellow sheets and they used them in preparing the return and they had this business or theory that somehow you could convert the disposition of the practice into a loss in 1980 and offset against that loss the fees that had been received in 1980 and wind up with a net long-term capital loss.

The additional evidence that Judge Claiborne gave Mr. Watson he $88,000 figure which is in evidence is absolutely beyond any dispute is to be found in the financial disclosure report that he filed with the Ethics Committee for 1980 and in that report which was filed in May, a month before the tax return was filed in June, he shows $88,500 received in legal fees.

Now does it make any sense to anybody that he would have reported $88,500 to the Ethics Committee in May and still have attempted to avoid reporting that income when he filed the tax return in June? It doesn't make any sense at all.

If he goes on record that he has $88,500 in fees, he certainly is not preparing to file a false return a month later which doesn't disclose that income. There's an issue in the case as to whether Judge Claiborne really looked through the 1980 return at the time he signed it. You heard Judge Claiborne's testimony, he was mistaken with the identity of the return in Mr. Watson's office.

His testimony is he simply went through it and signed it, he wasn't there but a few minutes. The most convincing evidence that he really didn't look at the return, there's two kinds of evidence, really. First if he really looked at the return and seen Schedule D which you're going to examine in detail, he never would have thought that

that was a convincing way of cheating on his income taxes for 1980.

That Schedule D as the Judge testified looks as if it's a rough draft intended to be typed. There's a notation they put the schedule up in the wrong part of the page under short term gains and losses, lines drawn down to show it should be typed down under long-term gains and losses.

The other evidence which perhaps is even more convincing that he didn't really examine the return is that the return itself failed to give him credit for two payments that he had already made on account of his 1980 tax liability. There's a payment of $20,818 which had gone in with the application for an extension of time to file the 1980 return. Also the $2500 which he'd paid on account of his estimated tax for 1980, is the return that he delivered to Watson, dated 4-11-80 which had been mailed in.

In computing the amount of tax that's still owing on the second page of the return, it's on the back of the front of the return you will find it, he was given credit for the two other payments that he'd made that were properly credited, no credit at all for the $20,000 payment or the $2500 payment. Now isn't it logical that if he'd really looked at the return, at least we think he'd looked at would be to see if he got the credit that he'd already made on account of the liability of that year? It's perfectly obvious he didn't.

Had he noticed that he would have raised a question about it. In not reviewing the return in detail for 1980 he was involving the same practice he followed for 30 years with Mr. Watson. He'd never gone over any return in detail after the return was done and in the preceding year the Judge had signed a return in blank and that had apparently happened in '78 as well.

I suggest to you, ladies and gentlemen, that in order to find Judge Claiborne guilty on Count VI which is the 1980 tax count you would have to believe that the yellow sheets are a forgery. There's been absolutely no evidence that would suggest that.

The evidence is uncontradicted at this point that the Judge prepared the yellow sheets, that he gave them to Mr. Watson, they remained in the custody of the Watsons until the return was completed and then they were returned to Judge Claiborne. You would have to believe that Judge Claiborne intended to report none of the fee income on his report but he nevertheless reported $88,500 on his ethics disclosure report just a month before the return was due and you would have to believe these things and have no reasonable doubt as to any of these conclusions. I suggest to you that in my view that's an impossible conclusion to reach.

I may not have picked up every point Mr. Hendricks made. It would be a very difficult presentation if I attempted to do that. But what I've tried to do is to forecast your attention on the exhbits and on the testimony that I think is relevant and critical that bears on the two tax counts.

I want to say a few more things just by way of concluding and then I'll stop. I want to say to you that it is frightening that a citizen of the United States could have been indicted for a serious offense and brought to trial in this court on the basis of the evidence presented in this case.

It is even more frightening and more disturbing to me that attorneys for the United States Department of Justice should have the affrontery to ask you to find Judge Claiborne guilty on the basis of such paper-thin evidence. I believe that you cannot possibly conclude beyond a reasonable doubt that the Judge is guilty on either of the tax counts or on the false statements count either as far as that goes.

Finally I'm confident that when you retire to consider your verdict in this case and you have before you the exhibits that are in evidence and you have your own recollection and notes as to testimony that's been given, you will rather quickly return a verdict of not guilty on both of the tax counts as well as on the false statement count. Thank you very much.

THE COURT: You have used 41 minutes. All right

Mr. Raggio.

MR. RAGGIO: Your Honor, may I have just a moment to marshall some exhibits?

MR. RAGGIO: You may use all the time you want to on your own time.

MR. RAGGIO: Thank you, your Honor. Ladies and gentlemen of jury, counsel for the prosecution, I also want to take an opportunity here in this moment to thank you for the patience you've displayed. It's been a rather lenghty trial, one in which you've been sequestered and away from your own families and daily environment but that's what the system of justice in America is about and for the defense we appreciate it.

We appreciate the fact that in a hot summer in August you've been asked to do this and assume this responsibility in giving up your own personal time, perhaps watch the Olympics and that sort of thing. It will be some time before you get caught up on what's occurred but it's been an important function and one in which I know as a member of this community each and every one of you are going to take to heart and not view lightly. It's an opportunity for you to ensure that this system, the administration of justice in America is viable.

I might say to you that if any one of us on the defense team at any time during this trial has acted in any manner which displeased you or if we have done something, please understand that also in our earnestness to see that the rights of Judge Claiborne are fully protected and preserved in this trial that we have done so.

If it has in any way upset you I would only ask that you not hold it against Judge Claiborne, hold it against me or at the defense counsel. But that is the reason, it's because of our earnestness in presenting our job and doing our responsibility here, assuming that responsibility. For most of you I think this is your first time as jurors.

Mr. Hendricks asked you to use common sense and I certainly ask you to do the same. The defense asks you to do the same. After that, that's what juries are all about. We don't ask you as Mr. Hendricks did to use a lot of assumptions and suspicions and bases of that kind for making a decision in this case. I ask that you also use your common sense when you discuss the evidence that I'm going to talk about.

In the interest of time my responsibility and obligation it is to talk to you about the last count, Count VII, the so-called failure to report a loan or a liability on an ethics form that was filed by Judge Claiborne in his first year as a Judge in 1978.

Since you have assumed your position as jurors and many of you for the first time I would hope that you would view this evidence as to Count VII as well as the other counts in the same manner if you were a defendant in a case you would want a jury to view evidence that was present, either a civil or a criminal matter but we don't expect in that regard that because Judge Claiborne is a Federal Judge that you treat him any differently than you would anyone else.

We don't come here and ask you to treat Judge Claiborne as a Federal Judge in any lessor way than you'd treat someone else but we also suggest that the law under which you have taken an oath requires that you treat him as you would any citizen in connection with your deliberations. I know you will do that.

I know also that as citizens of this community that that you will treat this case in that respect and that you will not judge Judge Claiborne for the manner in which he may act or for his appearance or because he may have some particular manner of combing his hair or something of that kind. That isn't the way we judge defendants in criminal cases. They are judged solely on the evidence, the facts and the testimony that's presented to you are jurors.

As to Count VII, we are down to Counts V, VI. and VII in this matter and I suggest to you that on the basis of the evidence that you have heard that Count VII may best be described as an afterthought count. There were many exhibits presented in this case on other matters and if you take them altogether I think you will agree that the government in its preparation of this case, that in the investigation which led up to this case must have shifted through a great deal of material to try to come up with something to sustain a charge of Count VII, making a false statement in an ethics report for 1978. There is absolutely no credible evidence I submit to you, ladies and gentlemen of this jury, as to any guilt on Count VII.

The tail of the dog of this indictment is Count VII. All of the counts as Mr. Johnston has indicated to you are weak. If you consider all and each and every item of evidence which was presented to you but certainly Count VII is based upon nothing. It's a charge made out of nothing, nothing of substance.

What has Mr. Hendricks brought forth in his summation concerning Count VII? I suggest you likewise take a sheet of paper when you go into the jury room and then draw a line down the middle and that you put on it on one side what is the evidence that persuades you in any way that there is any proof of Count VII that there was a filing of a false return, that in 1978 there was in existence a loan that was not reported and that on the other side and you put all the evidence against him.

Now I don't say that in deciding cases you have to count the exhibits on one side or another but in doing so you will find that there is absolutely no credible evidence of any guilt or proof that there was any loan in existence in 1978 which Judge Claiborne failed to report.

Now while Mr. Hendricks brings up motive, let's talk about motive. What possible motive, ask yourselves, what would Judge Claiborne have in 1979 when he had to file this form with the ethics in government, with the Judicial Conference, what possible motive would there be for him to say whether or not he had a loan? It's not income, if it were a loan or a gift it wasn't income. There's nothing that he would want to hide that's been shown by the prosecution in this case as to why he would fail to report a loan that existed.

If there were any reason to believe that, ladies and gentlemen, the government, the prosecution in this case with all of the agencies that are at its command, the FBI, the IRS, the ability to subpoena witnesses into Grand Jury at their whim and call before you information as to exactly who made such a loan and I submit that you reflect on that.

Let's go back on the evidence offered, the only evidence offered by the government is this exhibit which is the report or the work sheet prepared sometime in 1979 by Jay Wright. Please examine this carefully because Count VII rides entirely on this little informal scribble or notation nailed up here in the corner of this work sheet. Remember that this work sheet was made sometime in early 1978 -- excuse me, 1979 when Mr. Wright was preparing the 1978 tax return.

This is the only evidence of any kind that pertains to a loan. There is nothing in this case in Judge Claiborne's testimony, in Judge Claiborne's writings, notations, memoranda or office writings of any kind which indicate that there was ever any loan. How did this occur? I'm referring to Mr. Wright's testimony and he was asked in any event at the top of this document there's a notation, not income.

"Q. Is that in your handwriting?
A. Yes, it is".

He was asked to read it and he said.

"A. It's not income borrowed to pay tax for 1977.
Q. Do you have any present recollection of actually writing that on the work paper?
A. No.
Q. Do you have any present recollection of Judge Claiborne ever telling you that he had borrowed $75,000?
A. No."

Please remember those answers, ladies and gentlemen, because that's critical. When he was first questioned by the government after all the many hours of preparation his answer was that Judge Claiborne had given him this information and had told him it was a loan, but when pressed and that's what cross-examination is all about, but when pressed he had no present recollection of every having written that on the work paper and certainly no present recollection of Judge Claiborne every telling him that he had borrowed $75,000 and, of course, is made of the facts that there is loan indicated after this amount. And I would ask that you pay particular attention because I don't believe you will have any doubt about the fact I don't believe that Mr. Wright ever wrote loan.

This is the only place I have seen in any of the documents presented by Mr. Wright in which there's printed words. Look at his exhibit otherwise. Look at the exhibit of his diary and you'll note, exhibit 48, is the og or the diary that he made so much about, you won't find -- it's not his nature to bring anything. Somebody else put loan on that exhibit and you have every right and that's the most reasonable inference that you can draw. Now what did Judge Claiborne ever tell Mr. Wright about that $75,000?

Recall the date of August 31st, 1978 in. Jay Wright called -- correction, Judge Claiborne called early in the morning, if you will recall and asked, "This is the last day of my office, what should I do? Is there anything you need?" And Jay Wright told him in essence to get his records together and whatever was needed and he would pick them up. And he asked Judge Claiborne the most natural question he could have asked if he knew that Judge Claiborne was closing his office and getting ready to assume the bench the following day, "Have you taken care of your tax liability?" That is the liability for 1977 and Judge said, "Well, how much is it? You've got the statement." And there's no denial that Jay Wright had the tax bill from the IRS at that time and he said, "I don't know. I'll let you know".

And he called Judge Claiborne back and he gave him the amount, it was something in excess of $76,000 and indicated that he would bring the tax bill down to him. So that morning from Jay Wright, Judge Claiborne learned that his tax liability was $76,000 plus. What did he do? He did exactly what a reasonable individual would have done at that point. He went down to the Horseshoe and got the money and what did he tell Jay Wright? That's uncontradicted.

He said, "I'm going to the Horseshoe Club to get the money". That's the only thing Judge Claiborne ever told Jay Wright. That's before this exhibit was ever prepared. He told him, "I'm going to the Horseshoe to get the money", and that was the truth. Judge Claiborne went to the Horseshoe Club sometime around noon, he met with Ted Binion, Ted Binion went in and at his request got the remainder of money, $80,000 in

100 dollar bills.

Judge Claiborne brought it back to his office, he instructed Ginny Macelwayne, his secretary, to make a deposit slip, the deposit slip if you will recall is exhibit 33, I believe, and please note that it's for $75,000 there's no denial, it's not disputed, it was 100 dollar bills.

Now ask yourselves, if Judge Claiborne went down to get a loan somewhere to immediately to pay taxes and was told by Jay Wright he needed some $76,000 or some amount, would he have gone down somewhere and borrowed $75,000 in 100 dollar bills or is it more reasonable to believe he would have gone, borrowed the money, gotten a check from someone, a bank, a financial institution or even an individual and made a deposit.

But the deposit was in 100 dollar bills and it's consistent with Judge Claiborne's testimony about the gift from Sid Wyman. Now the government has said for the first time we don't dispute that there was a gift in 1972, so that's a gift. We know that Judge Claiborne received a gift from Sid Wyman in 1972. Sid Wyman you heard was a very generous individual, someone who made many gifts to people in 1972, the same year he gave this money, the sum of $100,000 to his close and geniune friend, Harry Claiborne, he gave $100,000 to his brother. We know that he was generous, he gave money to Loretta Powell or rather a house to Loretta

Powell and cars, he gave money to many people. It was attested to by many of Sid Wyman's close friends.

We couldn't bring Sid Wyman here of course because the gentleman died in 1978. But the testimony of the other witnesses who appeared here all related the fact that he was a high roller, he was a gambler, he was indebted, I don't know in the legal sense, but grateful for Harry Claiborne's efforts as an attorney in his case in Reno where everyone was acquitted. He told his friend Dave Goldstein that F. Lee Bailey, a noted lawyer, couldn't carry Harry Claiborne's briefcase so he had a high regard for him. We had to bring all that in because we had to show you and convince you that Judge Claiborne did have $100,000 in 1972, that he maintained that money from that time on and that Sid Wyman told him, "Look, use this for your own personal reasons, don't invest it, you make lousy investments".

If we hadn't brought all that evidence in, ladies and gentlemen, I can assure you you would have heard a lot of argument up here as to how that $100,000 was obtained. Now I don't ask you to agree that that is a way of life that all of you live under, that we're all going to get $100,000, but it's not refuted in this case. So we know that in 1972, six years before, Judge Claiborne was given $100,000 and we know from him as well as Ted Binion and nobody has denied this, there's been no evidence to the contrary, that that money was taken down to the Horseshoe Club, was retained there with the exception of about $20,000 that was withdrawn on either two or three occasions and that $80,000 remained.

The question is asked why would somebody leave that kind of money in a box. Well, that isn't any indication of a motive to deceive somebody. This wasn't income that had to be reported. The government will admit this. This was a gift, you don't have to report a gift as income and you don't either have to report it on an ethics form but lots of people keep money and large sums of money in safe deposit boxes and you probably in your life time have known them who don't draw interest on that money.

The banker who came in here to do a computation for interest to show you that he could have made some money on it admitted maybe reluctantly but admitted there are safe deposit boxes that are opened and there's large sums of catch. Mr. Binion indicated that people keep cash there.

Now they are trying to tell you that Mr. Binion shouldn't remember this occasion when Judge Claiborne went in and took $80,000 out of the bank -- correction, out of the Horseshoe Club? Certainly he should, he's a good, close friend of Harry Claiborne's. The family has known Harry Claiborne, there was an accomodation to Harry Claiborne, at that time an attorney and he remembers the incident well.

There is no reason for Mr. Binion to lie here and believe me, if he had in any way attempted to do so they would have had him up before a Grand Jury or something.

MR. HENDRICKS: Your Honor, I object to this, the comments as to what the government would have done. There's no evidence in this case and it's improper argument.

THE COURT: I will charge the jury in a proper manner.

MR. RAGGIO: So the whole case of the government on this issue, ladies and gentlemen, rests entirely upon some notation on a work sheet which was put there sometime in 1979 by Mr. Wright himself and I ask you this. If you were in this position would you want your fate determined by some notation or memorandum that you did not make yourself, no evidence that you ever made that notation yourself? Those of you who maintain offices and keep records and diaries make records of little items that occur. Would any of you say that those are infallible items? That's an impression you make or something of that kind. Would you want your fate decided upon that basis?

I say to you that that is not the way that these material decisions, substantial decisions should be made.

Mr. Hendricks called it a contemporaneous notation and I say to you that the best record of this, this doesn't rise to the dignity of a record. It was a work sheet and at some point in time Mr. Wright wrote something on there, "borrowed to pay taxes". That could have come from any suggestion made but the evidence is clear there's no other evidence of any kind and Mr. Wright himself doesn't even recall it today that that was what Judge Claiborne said. He assumes it because it wrote it down.

He also admits to having been in Judge Claiborne's office on August 31st because there's a notation in his own log. The fact that telephone calls are not in there for that day is meaningless because by his own admission he has failed on many occasions to write down simple things such as telephone calls.

Any of you who maintain logs or diaries of that kind know that that's exactly what happened. As an attorney, real estate man, you don't write down every telephone that you make or that comes into the office. It would be impractical and impossible. Why didn't he pay this tax in June if he had the money? The same question would be asked, why didn't he go down and get a loan if that's what he said he did in June to save some penalty. He could have done that just as easily in June as he did in August. So it works both ways.

The government is grabbing at every straw on this count as well as other counts and ignoring all of the reasonable inferences and interpretations which can be drawn from the evidence and the testimony. They want to ignore that completely to prove guilt and I say to you that that is not the system of administration of Justice in America.

The system and I've been on both sides, ladies and gentlemen, the system is that the evidence taken is as a whole and given every reasonable and proper inference which has to be considered you and if you do that as responsible citizens in this community and after all this isn't the government, you're the government. The people still are the government in this country and that's the basis upon which our own country exists and I will continue to insist those are your decisions to make and I trust you will make those decisions on that basis, that you will find Judge Claiborne as an individual like yourself who may have been careless or negligent or maybe didn't take the proper time to consider things, that he did not willfully at any time do any of the things which the government has claimed he has done for whatever reason they claim it in Counts V, VI and VII.

Again, thank you for your attention, thank you for taking the time to consider this complete and objectively. I have no concern that at the conclusion of your deliberations that you will be able to return to this court and return a verdict of not guilty, not only on Count VII but certainly on all three counts. Thank you again.

THE COURT: You used 25 minutes, Mr. Raggio. That leaves us with 24 minutes, I believe, for Mr. Goodman. Before Mr. Goodman starts there was reference early in Mr. Raggio's argument to some suggestion that you have should place yourself, put yourself in the same manner as if you were the defendant. You do not base the case, ladies and gentlemen. And put yourself in the particular position of the defendant that's not the proper way for the jury to conduct deliberations. All right, Mr. Goodman, you may proceed.

MR. GOODMAN: If it please the Court, Mr. Claiborne, ladies and gentlemen, member of the prosecution, ladies and gentlemen of the jury. About a week ago I stood before you in an attempt to simplify the case that you were going to judge. We've come to that time when I hope that the guidelines which I tried to set forth were of some help to you in helping you make the most important decision in Judge Claiborne's life.

Our system is designed to protect fellow citizens no matter how high their position from being convicted of serious criminal offenses if the prosecution has failed to meet it's burden of proof which is a burden of proof beyond a reasonable doubt.

And I said to you a week ago that I hoped at the conclusion of all of the evidence I would be able to be in a position to look each and every one of you in the eyes without any hesitation, without any equivocation and ask you to return a verdict of not guilty based on the proposition that the prosecution has failed to prove its case beyond a reasonable doubt because that's the standard upon which our system of Justice is based.

We could have sat there like bumps on a log and let the prosecution present its evidence and if we felt that they hadn't met its burden of proof beyond a reasonable doubt we would have had every right to rely on that principle which distinguishes us as American citizens from those persons who live in Russia, who live in the Communist countries who are subject to torturing, the Second World War, those countries which are not the true democracy ours is.

So when a citizen, a citizen who happens to be a Judge, stands before his peers, fellow citizens who will sit in judgment of him, he is entitled to the presumption of innocence to remain with him through the trial in a case where the prosecution has failed to sustain its burden of proof beyond a reasonable doubt.

What is a reasonable doubt? Sometimes we think that everybody because we see Perry Mason and watch television knows what these concepts are, but they are very important principles which are deeply embedded in our system of Justice. A reasonable doubt is just is that, a doubt based on reason.

The type of doubt which would make you hesitate in the most important of your own affairs. Shall I leave my job, shall I move to another state, shall I marry this girl or this man? The most important of your affairs and if you hesitate in making that kind of judgment that is a reasonable doubt and I submit to you that as to the proof in this case, Count V and VI and VII, the matters which are before you after you heard the evidence off the witness stand and the rational arguments of counsel you must have a reasonable doubt.

And even though you may conclude that a person in a lofty position like Judge Claiborne was careless, was negligent or even grossly negligent because we are in a criminal trial with criminal charges, that impression is not enough to carry the burden of proof beyond a reasonable doubt because the Court is going to instruct you that carelessness, negligence or even gross negligence is not the standard. The standard is a willfulness, an intention to evade the law, to have bad purpose, that's the criminal standard.

Shame on Judge Claiborne perhaps for not being more careful, shame on him for being negligent or even grossly negligent but that is not why we're here. We're here to determine whether or not the prosecution has met its burden of proof beyond a reasonable doubt.

When you are instructed after Mr. Shaw makes the closing remarks for the prosecution as to the law, pay careful attention to all the instructions but please heed the instructions as to why we're here and what the purpose of these proceedings are and the context of the administration of criminal Justice.

Mr. Shaw goes last for a reason. He sums up last for a reason and that is because of the beauty of our system.

It recognizes that the prosecution because it has the burden of proof beyond a reasonable doubt should be able to speak last. And, therefore, I must ask you at this point in time when you deliberate back in the jury room to ask questions which Mr. Shaw might raise which you believe either Mr. Johnston or Mr. Raggio or myself could have answered had we given the last argument, had we been given the opportunity to respond.

Look at all of the evidence, look at all the exhibits, remember what came off the witness stand. That's your obligation, that's your duty, that's your function to determine whether or not the prosecution met its burden of proof beyond a reasonable doubt.

Now I'd like to cover areas perhaps that weren't covered at least initially by my colleagues in responding to the argument; motive. We have to call upon our day-to-day common experiences in judging the facts of the case. Remember what takes place in a prosecution of this nature is that events of some five years past come to the forum from the witness stand.

Recollection is called upon in order to search what the truth is as far as what took place and persons when they are engaging in activity back five years ago are not making the type of mental remembrances that they are called upon to come up with from the witness stand and how the prosecution brings out as a major issue whether or not Judge Claiborne on his direct examination says that he thought he met with a woman by the name of Peggy whose name he was told at some later time was Peggy Kotecki and hang case on that. That's a smoke screen.

Ordinarily the defendant is charged with smoke screens. Now in this case the defendant is the one who brought forward the expert witness to testify to all of the evidence after all of it was in and not an expert witness to testify as to only half of the story, the half that the prosecution wants you to believe.

We're here to judge the entire set of facts, everything that came from the witness stand and how the prosecution tried to present some type of inference of impropriety on the part of Judge Claiborne because after a responsible phone call by Judge Claiborne on Monday morning, "Jay, are you well, how do you feel, are you coming back again", what kind of inference is that supposed to create?

But that's the type of shotgun approach that they try to use on a man who has led his entire adult existence based on the creed, based on the creed while he was in the private practice of law that if there is a doubt, if there is a doubt resolve it in favor of the Internal Revenue Service. That's what he said.

And for the prosecution to expect us to accept the fact that when a man becomes a Federal Judge he has the same type of habits and customs that he had when he had a full staff law office upon whom he relied as far as bookkeeping purposes where he was getting fees on a daily basis and had to record the fees in a very careful manner for the purposes of his tax return, to make us even think that he's going to have the same procedure when he gets intermittent checks, four checks in one year, nine checks in another year, that he's going to use the same kind of procedures, that's poppycock and that's nonsense and that's not why we're here.

And to make us think that Judge Claiborne all of a sudden once he takes the bench is supposed to for the first time realize that he has commitments of alimony that he's not going to be able to meet, that's boggles my imagination, that casts incredibility on the part of the jury and jurors on the whole are the smartest animals in the system.

When you put your 12 collective minds together you come out with the right answers, but to have us think that the man didn't know what his salary was going to be, when he went on the Federal Bench he knew it was going to be 54,000. To make us think that he doesn't plan ahead, that's foolishness.

Motive. They make us try to feel that Judge Claiborne is doing something secretive as far as the cashing of checks. Goes into casinos where he's known, on every single occasion he's endorsing the check with his own name. He didn't to go Annette Quintana and say, "Annette, you know that $5,000, you're going to give me in $1,000 increments? Why don't make it out in cash? I got one better for you Annette. Why don't you cash it and give it to me".

He didn't say that. He got the check and endorsed the check with Jim Brown, he got the check and he endorsed the check, the $44,000 refund check that he got from the Internal Revenue Service. I guess in this great effort of secrecy to hid his activity he endorsed it Harry E. Claiborne and took it to a casino and cashed it.

Maybe you or I don't cash large checks but to try to create an inference from Mr. Diaz who says well, that doesn't matter to me, I don't think that has anything to do with the cashing of checks just because he cashed an IRS check.

Now you ask yourself whether that was an honest, candid answer and that's what we're here for, to get honest, candid answers. The best people can't recall events off the witness stand.

Very briefly, because my time is limited, I'd like to touch upon what I consider to be the key incident as far as the case is concerned.

Judy Ahlstrom on April the 11th of 1980, a woman who got on the witness stand and she was scarred because it's not easy to be on that witness stand, to have an attorney barking at you to expose your very sole to the process, she said under oath with no reason to lie, and I challenge them to manufacture a reason for her to lie which you'll accept, with no reason to lie say that she took the April 11th letter which made a full and complete disclosure to Jay Wright, Judge Claiborne reported all of his income from private practice to Jay Wright.

She took that letter down and as corroborated not only by Judy Ahlstrom, it's corroborated by Judge Claiborne, by an $8,000 check, it's corroborated by a request for extension, it's corroborated by $2500 and it's also corroborated by Jay Wright's notes and it was delivered as she said during noontime and Jay Wright wasn't even there during noontime to write his notes.

The other exhibit, a full and complete disclosure by

Judge Claiborne to Jerry Watson.

Now I told you when I spoke to you about a week ago we're not trying to justify Jerry Watson's return. My God, if the Judge Claiborne wanted to evade or deceive would he have taken a red herring return like the one that Jerry Watson prepared in pencil with arrows, with schedules that weren't filled out? Of course not. Careless, negligent, grossly negligent, yes and shame on him. But criminal, no.

Nobody who is trying to kid anybody, to fool anybody they are going to sign a return like that and have it sent into the IRS. But Judge Claiborne did make a very careful disclosure and a painstaking evaluation of his financial condition, a complete disclosure to Jerry Watson of $88,500, of the income, $600 more than the income that he received.

The $88,500 was given to Jerry Watson in what's been referred to as the yellow sheets of paper and it's not just one sheet of paper, it's a series of paper setting forth the entire transaction concerning the sale of Judge Claiborne's home with the little drawings on it for the walls. Watson put some so.

Judge Claiborne put in a full and complete disclosure and then it was Watson who treated the return. Careless, negligent, grossly negligent, yes, but not criminal. Then we come to Count VII. Count VII is the disclosure form to the

Judicial Ethics Committee.

It is clear, it is clear that Judge Claiborne had money at the Horseshoe which were being maintained for him by Teddy Binion. It's uncontroverted. There's not one piece of evidence to the contrary in the entire record.

You didn't hear anything different from the witness stand. Teddy Binion said on two or three occasions Judge Claiborne went and took moneys from the $100,000 until it got down to about $80,000 and Judge Claiborne testified in full candor that he took $80,000 out the last day of his private practice on August the 31st of 1978, that he placed it in the bank so he could write a check to the IRS.

Now he also said he took $5,000 and put it in his pocket, but a piece of evidence which I ask you to look at is Judge Claiborne's bank records at the time that the moneys were paid to the Internal Revenue Service.

At that point in time when Judge Claiborne cleaned out the box, so to speak, and put the $75,000 into his bank account upon which to write a check in order to save his obligation of $76,000 to the Internal Revenue Service Judge Claiborne already had, he already had over $45,000 in his bank account.

Now if Judge Claiborne was trying to pull a fast one or was trying to deceive anybody he's certainly not going to put $75,000 into a bank account and then try to concoct some sort of story because there wasn't any kind of story to concoct when Judge Claiborne filed his Judicial Ethics form. He acknowledged it truthfully that there were no outstanding loans during the year of 1978 and that's the state of the record in this case.

But the prosecution is asking you, Mr. Hendricks asked you, Mr. Shaw is going to ask you to return a verdict of guilty of a fellow citizen based on their way of looking at the case.

I ask you when you're making your judgment of a fellow citizen and a fellow human being to look at all the evidence in the case and I submit to you if you are to keep your oath which I know you will, you will conclude that they have not met their burden of proof beyond a reasonable doubt. You will have that type of hesitation when you're making your determination that as to the facts of this case and I submit that this man, my friend, should be permitted to begin his life again, should be permitted to do what he does best, should be permitted the opportunity to serve in the capacity which he spend his very professional existence over 30 years to achieve, to get back to judging, to put this behind him and in order to do that I ask you, I besiege you to return the appropriate verdict under all the circumstances within our system of criminal justice and that is not guilty on all three counts. Thank you.

THE COURT: Member of the jury, you may take a ten minute recess after which Mr. Shaw has 26 minutes left. I will give Mr. Shaw two minutes longer. Ten minutes recess.

(A short recess was taken.)

THE COURT: Mr. Shaw, I believe you asked for a two minute warning? All jurors are present. All right Mr. Shaw, you may proceed.

MR. SHAW: Thank you, your Honor. Ladies and gentlemen of the jury, counsel on both sides, this is coming up to the end of what has been a long trial for you and a lot of talk that you've heard this morning. You are going to be talking yourselves this afternoon about what you have heard as evidence in this case and I will remind you if I may as you have been reminded before what we're saying is not evidence.

The evidence is what you see in documents and what you see and hear from the witness stand. Now there's a distinction that's been made quite often and quite frequently, that somehow a memory four years ago is supposed to have greater significance than documents made at the time the events occurred.

What I would suggest to you that what your common sense is going to compel you to find is actually the reverse; memories from four and a half years ago are not nearly as significant and important and reliable as documents made at the time that the events occurred. It's not significant that Mr. Wright gives you his honest statements that he doesn't recall the details of these specific conversations.

He knows his business practice, he knows what entries he has made of what his notes mean to him and it's obvious what his entries mean to everyone if you're looking at the documents. So please look at the documents and don't be carried away by the smoke screen made by defense that memory controls.

Use this example. What about a bank robbery, for example, where you have a photograph taken in the bank of a bank robber and you're trying that case years later.

Are you as a jury going to want to depend on what that photograph looks like when you do look at that photograph or are you going to take somebody's memory of what that face looks like of that bank robber? I suggest that rather than memory being more significant it is, in fact, the document that is more significant and please keep that in mind when you go through all of the documents in this case.

Mr. Goodman would have you believe that reasonable doubt in this case and in all cases means that if you would hesitate to make a decision that that means you have reasonable doubt.

I'd suggest to you that the Court will instruct you that reasonable doubt does not have that definition.

Reasonable doubt means doubt based upon reason. It is not evidence that does not raise some sort of doubt, it is not proof beyond all doubt. Reasonable doubt you will be instructed I believe is evidence so convincing that you would make the most important decisions in your life, not that if you hestitate you wouldn't make a decision.

It's just so convincing that you would make that decision, you would look at all the evidence, you would take all the brochures about all the automobiles that you were think of buying and you would make a judgment and you would go ahead and do it and go on with your life and make that decision and I would suggest to you the evidence in this case is convincing well beyond that standard.

Now if I may first address briefly 1979. There are three figures, three legal income figures that have been bandied about in this case and there is a lot of confusion that has come up with these figures, but keep in mind there are only 3 figures, a $45,000 figure, a $22,000 figure and a $41,000 figure. Those are the only dollar amounts that have any significance to the 1979 year.

Which of those figures were given to Jay Wright by Judge Claiborne is what is important on the 1979 year. Of course he gave him the $45,000 figure first way back in March.

Now that figure was not a report of income for income tax purposes. Judge Claiborne wanted Jay Wright to have the $45,000 figure so that he would report that to the financial institution. He wanted a high figure when he's trying to get a mortgage and later when he's worried about paying income taxes gives a low figure. That's the figure that comes in later.

The $22,000 figure, you all recall where that came from. Everybody has been dragging out exhibit 28 but that is a significant exhibit and that is the exhibit that lists the deposits according to Judge Claiborne and which of those deposits are fees according to Judge Claiborne? And you'll note that fee is written in Jay Wright's hand in printed form as he often would do when you're running up against the margin there just like he wrote loan in the other document.

The defense explains to you that Judge Claiborne explained how could Jay Wright possibly have gotten this information about which of these figures were fees other than from Judge Claiborne? They would have you believe that an accountant goes into his office and locks the door and does some kind of mysterious juggling act. He knows which of these figures are fees. Jay Wright has no way of knowing that.

You heard him testify and you saw all his books. There's not one piece of paper prior to the date of these entries that would tell him which of those deposits are fees.

It would have to come from Judge Claiborne whether it was by telephone or person. What difference does it make? It would have to come from Judge Claiborne. We have Judge Claiborne at that same time, in the spring of 1980, reporting to the government in the Ethics form his $22,000. The reconciliation that you see occurring on here is $22,000 roughly.

There's nothing magic about this document down here. Look at all the entries that say fee and add them up yourself. There are on these four entries. Jay Wright did nothing in terms of analyzing it. They would have you believe that he went into his room and made an analysis and came up with what the fees are. He did not make an analysis, he added four figures that we could all add and you can probably add just sitting there looking at those. He did nothing but add up the four figures that Judge Claiborne gave him.

In furtherance of that we have Judge Claiborne in his own handwriting writing out that same figure. Judge Claiborne would have you believe that he called Jay Wright, Jay Wright gave it to him so he would deliver it back to Jay Wright. Is that common sense? Jay Wright if he had the figure would have said, okay, no problem. But he wouldn't have said, oh, that's right, please, I'll dictate it to you, I'll write it down and then you deliver it to me. It's not consistent with common sense. We also have the $41,000 figure.

What evidence do we have of that? We have the Defendant's testimony. We do not have Judy Ahlstrom's testimony that there was a $41,000 figure on there. She doesn't know what was on that paper four and a half years ago. She remembers delivering something as to Jay Wright. She says it was the $8,000 check and the W-2. We know that information got over there. It's not inconsistent that she could have taken those documents over there. But it is inconsistent that she took the $41,000 figure over there on this defense exhibit number 1.

It's inconsistent because as you heard Mr. Hendricks say earlier and I'm not going to repeat, look through the chronology of what had to have happened in this case and Jay Wright would have had to report that $41,000 in several contexts if, in fact, that had been given to him.

What is the evidence of the Defendant's knowledge that this return, that the return was false? First of all you'll hear that you may reasonably draw an inference from the fact of the significance alone that Judge Claiborne had read that and was aware of it or had knowledge of it. Now beyond that inference which is reasonable to draw you have the following additional evidence that he knew what he was doing.

That is Jay Wright's logs. Now on June 16th, the day that that was mailed and this is without dispute, that return was mailed on June 16th. It's postmarked there and you'll see it in the exhibit. And that same afternoon Judge Claiborne was in Jay Wright's office. Now Jay Wright doesn't have a recollection of what occurred during that meeting but his records show that he happens -- he makes those records comtemporaneously. Why would Judge Claiborne be in his office on the afternoon that it was filed when Jay Wright had spent two and three-quarters hours working on the return?

Did he drop by the for casual conversation? I suggest to you he dropped by to sign that return. Why else would he be there on the exact date it was to be filed? He signed that return, he had to know what was in that return. Why would he put a false date on there? We have an admission from the defendant that he intentionally falsified the date on his 1979 return and he's asking you because he intentionally falsified it to draw some kind of favorable inference.

He says he signed on it May 2nd and put an intentionally false date of June 15th on it, we said he signed on it June 15th and intentionally put a false date of

June 15th on it. He suggests to you that it's more reasonable that if he had signed on it May 2nd he would have dated it May 2nd.

Why would he date it in advance? He had nothing to gain by that. It was due June 15th. It was quite proper to sign it May 2, what's wrong with that? It's more reasonable that Judge Claiborne on June 16th wanted to convey to the IRS that he actually signed it on the date that it was due which was June 15th so he backs it off one day and dated it the day before. That's much more reasonable. Now I've asked you to focus on four documents primarily with regard to the 1979 year.

I think you should look at all of them, of course, and recreate the chronology that Mr. Hendricks showed you and that will force the conclusion that he's guilty of this crime.

But focus if you would on exhibit 31 which is $22,000 in Judge Claiborne's own handwriting made in the spring of 1980, the $22,000 which had to have come from Judge Claiborne. Also in the spring of 1980, the ethics in government report which is also roughly $22,000 which is also the spring of 1980. Now all those events happened roughly the same time, within a month, month and a half. We also have Judge Claiborne's book, exhibit 47, showing the true, honest figure of $41,000.

Now that doesn't work for him. I suggest that works against him. This book shows what he had in mind in the spring of 1980. He knew full well that he had $41,000 in legal fee income from that year, he had that in mind, he had that in his mind at the same time that he was doing all of these other figures, writing down all of these other figures, all in the same time frame. Now it's not so unreasonable to suggest that he should have a memory of having reported half his income. If we're talking about a two or three year time span you may be confused that your income was 41,000 or 52,000.

But when you do all of these events and write down all these entries in here and then at the same time you know in your mind that it's really 41,000, what is the conclusion to be drawn from that? That he knew what he was doing, he intentionally falsified the information that he gave to Jay Wright and intentionally signed a false tax return for 1979. 1980. Everyone is in agreement about everything in 1980.

I mean it's hard to find any disagreement with this year. You heard a lot of argument about the yellow pad having disclosed 88,500 to Watson and at that. That's a nonissue. You haven't heard any dispute about that.

He disclosed the 88,500 to Jerry Watson. Judge Claiborne has testified that he earned 88,000 that year, that he reported none of it as ordinary income, he agrees with that, it's not reported as income on his tax return as it's supposed to be. He agrees it's a false tax return because he hid it.

He doesn't agree that he hid 88,500 but it's a false tax return, there's no 88,000 in there as ordinary income. The defendant agrees with that. The defendant agrees that he signed the completed tax return, unlike what he's saying with respect to Mr. Wright. He says he thumbed through it.

Now you can infer that by signing that complete tax return he knew his income. There is no need to worry about that inference because we know that he thumbed through it.

Jerry Watson testified he more than thumbed through it. He said that the copy later he went through page by page and you heard the prior testimony that he gave on that matter where he was asked, Jerry Watson, how much time did you spend in his chambers discussing the tax return with him. And Jerry Watson's answer was,

"A. Well, we probably discussed the tax return about ten, 15 minutes and we were visiting, however, it came about that I called him to tell him the tax return was finished because I normally don't believe and he asked me if I had ever been in the Judge's chambers and he said, 'Why don't you come down and I'll give you have a tour." Court was not in session so I delivered the return. And I think I was there probably an hour.

Q. What portion of that hour was spent discussing his tax return?

A. I can cover one of those tax returns with you in ten or 15 minutes.

Q. Did you leaf through it and glance through it?"

I'm not leading him with that question, I'm asking him did you just leaf through it and glance through it. And his answer was,

"A. We went over every page. That's what we did here and this is what happened here and that is what your refund is going to be and a general summary.

Q. Did he sign it in front of you?

A. I can't recall."

But on that prior occasion, Jerry Watson has a clear memory of going over every page with Judge Claiborne. Is it reasonable to be impressed with Jerry Watson? Is it reasonable at that time when Judge Claiborne after having a tax accountant, a public accountant for 30 years to all of a sudden drop him and go to Jerry Watson who attended Altas

Junior College, went to work for a life insurance company, has had four business names?

You'll see on the letter that he sent to Judge Claiborne he signs his name Jerry Watson, CLU, certified life underwriter. I mean he's writing that on his letter next to his signature and he's sending it to Judge Claiborne. He's not holding himself out to be an accountant.

Judge Claiborne knows what he's getting into, and leaves Mr. Jay Wright after 30 years. I suggest to you he knows Jerry Watson is honest, he's testified that he has great respect for Jerry Watson -- or rather Jay Wright, and had Jay Wright in his mind at the time he was going to do the tax return, that he thought he was going to do the tax return for 1980. Jay Wright knew about the $41,000 that he had gotten earlier that year. Remember this exhibit?

Judge Claiborne had already told him about the money he had received in 1980, so there was going to be no way that Judge Claiborne was going to get Jay Wright to forget about that and to conceal it because Jay Wright is honest. Now he knows he's got to go get himself another tax preparer. He ends up going to Jerry Watson who charges him $2,000.

Doesn't that suggest something to him, Creative Tax Planning on the door, charges $2,000 and eventually comes up with a tax return and all of us are in agreement it's a joke, it's a joke on page 1 through the final page in that document.

Spend some time with that and even if you believe the Judge's testimony that he only thumbed through it I suggest thumbing through that return is all that it takes. It doesn't take more than thumbing through that return to see that it's a joke. It's on page 1 where it says other income and there's a blank space. He knows he wasn't reporting that $8,000.

It's written in pencil and pen throughout, there's no Schedule C where you're required to report these, earnings and expenses as legal fees. The same Schedule C he's been looking at for 30 years. There's nothing of that and it's obviously a bizarre and strange Schedule D. Doesn't take much to have look at this Schedule D and know what he's doing is buying himself a defense for a criminal case. Look at how Jerry Watson even testified in this trial, wh t he told him before he signed the return. He told judge Claiborne that this Schedule D was going to include the accounts receivable which was, what was the legal fees that were coming in that year. Jerry Watson testified as follows:

"Q. Was another factor that was going to be plugged into the loss of this business the money that he'd received in fees during the year 1980 that he had earned before he have became a Judge?

A. That was accounts receivable.

Q. You had discussed that with him also?

A. Well, not particularly dollar amounts. We had just discussed those things I told you as factor that value into the business as a going concern.

Q. And accounts receivable was one of those factors?

A. I believe that's correct."

He discussed with Judge Claiborne the fact that he was going to bury his legal fee income on this by a schedule D. Judge Claiborne had actual knowledge of that. Even if you have trouble with the actual knowledge concept, which I don't think there is any question about in this case, there's a concept you're going to be hearing from Judge Hoffman called deliberate ignorance.

That is if we do things in our lives and deliberately avoid the truth we're responsible for those consequences. A good example of this is if you find yourself in the Miami airport, somebody comes up to you with a suitcase and says, "Here, would you carry this suitcase through customs and here's $10,000", if that persons takes the suitcase and the $10,000 and walks through custom, they don't have actual knoweldge, I suppose, that there's drugs in that suitcase but they can't avoid the criminal liability of that.

They can't avoid the compelling interests that they have knowledge of was in that. I suggest that as the same concept. He walks into Creative Tax Planning and closed his eyes from that moment on, didn't ask Jerry Watson any questions about his background, his experience, his expertise, didn't want to know anything of that. All he wants to know is here is $2,000 for my work, for the work that you're doing for us and then what pops out a couple months later but a $44,000 refund check, deliberate ignorance at best.

Another smoke screen that has been raised is with respect to the loan. That is somehow because we have all of these people testifying that there was a gift in 1972 that somehow that suggests that there was not a loan in 1978. Why do those two concepts necessarily have anything due with each other? They don't. We agree there was a gift in 1972 so put that aside.

Now let's look at what evidence there is that there was a loan or that there was not a loan. We have the evidence that if he had stuck that money in a safety deposit box for six years he would have lost up to $34,000 he could have earned in interest. That is not a concern of his in making a good or bad investment. We're talking about the safest possible bankbook investment. $34,000, he's asking you to believe, he would just throw away because he liked having all of this money in the safety deposit box. This is also a taxpayer who you will see from these returns has other investments.

It was not his practice to keep items in safety deposit boxes. He has TCDs, he has savings accounts and three or four banks at a time. His practice is to deposit those and have it gain interest, not to throw away $34,000.

Now we also have the change in Judge Claiborne's testimony from the last trial to this trial. He's changed his approach to how he thinks he can convince you that there was no loan even though the records in Jay Wright's office contemporaneously made that there was a loan. Last time you heard through the questioning of Judge Claiborne he testified that there was one conversation with Jay Wright about this transaction and that that conversation occurred at the end of the year, not August 31st but at the end of the year and the question according to Judge Claiborne, Judge Claiborne said to Jay Wright you will find a deposit of $75,000 presumably when you're going over the deposits to determine the income for the tax.

He said you will find a deposit of $75,000. And then he goes on to explain it. At this trial, what does he tell you? That there are two days now with conversations, first August 31st, 1978. I, Judge Claiborne, had two telephone conversations and a person to person meeting with Jay Wright on August 31st and he specifically knew that he went down to Binion's and he got the money then and this is all the conversation related by Judge Claiborne and then there's a second conversation. Of course none of those August 31st conversations or meetings appear in Jay Wright's book. I mean a face-to-face meetings with the client would certainly end up in that book as opposed to perhaps a casual telephone conversation.

But Judge Claiborne would also ask you to believe that there is now this second conversation later in the year or perhaps the spring of the next year about the taxes and that that was -- you will recall with Jay Wright talking about the transaction that I told you about last time? A complete change in his testimony. He would have you believe also that because of the $54,000 cashier's check in his drawer that somehow that shows that he doesn't care about earning interest.

It shows to the contrary. This is a check that he forget about, it's not a check he puts deliberately because he didn't want interest, he forgot about it, not what he would have you beleive with the safety deposit box.

What did he do with the money he found, that $50,000 check? He ran down and deposited it so it would start earning interest. That's what Judge Claiborne's own testimony says. We suggest to you that's what he would do with that gift and that's what he did do with that gift in

1972.

This is a false statement case. Keep in mind that the issues involved here are whether there was a deliberate falsification in that context, false statements to the IRS, he made false statements to his Federal Judges, his fellow Federal Judges of the United States District Court of this country. He lied to them and he also has lied to you in several contexts. It's not a big deal necessarily that he remembered Peggy Kotecki as being the person that went over the tax return with him.

What is important is how he treated himself, how he handled himself when that question arose following his direct examination. On cross-examiantion he said it was Peggy and he said he was certain it was Kotecki. What happens next?

The government subpoenaes her. What happens next?

She calls Oscar Goodman's office and then that afternoon when Judge Claiborne takes the stand for redirect, all of a sudden out have nowhere he said, "I don't remember really whether it was anybody named Kotecki". And of greater signficance on cross-examination, "Are you changing your story about Peggy Kotecki because you heard Peggy Kotecki was called"?

He said no. He would have us believe that Peggy Kotecki called Oscar Goodman's office and he concealed that fact from his client. Do you believe that? We also have the fact that he called Jay Wright on the morning of Judge Claiborne's testimony. He would have to believe that was a concern for Jay Wright's health. He would suggest that it was more of a certain of Judge Claiborne about the fact of whether I can get away with making up these dates back in the spring of 1980.

He's concerned if Jay was going to be to go coming back up to testify on redirect, then there is a chance that he'll be bringing this book and I better change my testimony.

What we have is a fabrication of details by Judge Claiborne that you may consider and should consider as well. He would have you believe that that letter, that he remembers seeing that letter on the desk of Jay Wright four and a half years ago. That alone without any contradictory testimony would suggest to your common sense that he's fabricating it or making it up.

It's one thing that you gave information to somebody, but to say that you remember what the different piles were on the desk in the office is a claim that is beyond anything that you should rely upon. We have a defendant in this case who treats the truth as his personal toy. He uses it and claims it to be the truth when it's to his best advantage.

He says to Mr. Rothman he's desperate for money when we're talking about a motive for him to violate the law. Well, he wasn't desparate, he was lying to Rothman.

We have a defendant who says to Jay Wright in February of 1980 that $45,000 was his legal fees when he wants a mortgage but now it's only $22,000 when he's worried about paying his tax. Please, when you go into the jury room do two things if nothing else. That is read the documents, take your time and look at them because they were contemporaneously made and they compel the finding of guilt in this case.

They show what happened, the chronology that has to have occurred and use your common sense. That's all anyone asks you to do in this case, use your common sense based on what those documents have to say and as the Judge will define reasonable doubt that the defendant in this case is guilty of all three counts. Thank you.

THE COURT: Members of the jury, as I told you yesterday, I would fix luncheon for 1:00 o'clock and it looks like I fixed it right on time. You are excused at this time, probably until 2:30 but if you need further time, I don't know what the situation is at the hotel and/or wherever you're being fed, if you need further time don't you worry about it. You maybe excused. Gentlemen, I assume that the Court will be in recess until that approximate time, 2:30?

MR. GOODMAN: Yes, your Honor. Would you be kind enough to provide us with a copy of charge so we can follow it?

THE COURT: Yes, I certainly will. I went over it, not that I wasn't interested in what Mr. Hendricks said, but I spend my time going over the charge and found several errors that had to be corrected so they have been now and that was while Mr. Hendricks was doing the talking.

MR. GOODMAN: I wouldn't dare suggest that your time was better spent doing that but I appreciate it.

THE COURT: All right, gentlemen, we'll be in recess until 2:30.

(The luncheon recess was taken.)

THE COURT: May I call counsels' attention before the jury comes in to certain typographical errors on the charge that I will read to the jury and then deliver it to the jury after it having been read. On page three, line six, the word "substantial" shall be corrected by me and I have initialed it.

On page 14, line nine, the word "name" has been corrected by me because of a typographical error and I have initialed it. On page 15, line 13, the letter "F" has been changed to "N" and I have initialed it. On the same page, 15, line 24, you'll notice that the second "with" should be deleted and the word "the" inserted in lieu there of. I've initialed both of those.

These are the corrections I made. I take it there's no objection to those corrections? All right, Mr. Marshal, you may call the jury.

(Whereupon the indictment was fully read by Judge Hoffman.)

(Whereupon the jury was duly charged by Judge Hoffman.)

THE COURT: This, ladies and gentlemen, concludes my charge except for the fact that I will call your attention to two matters. One is the verdict form which will be handed to you.

It contains the name of the case and the file number from the clerk's office and that is of no consequence. You don't have to pay any attention to that. Then it reads as follows. "We the jury report our verdict in the above-entitled case as follows. Count V, tax count, calendar year 1979", then there's reference to the United States code section, then this language. "We the jury find the defendant, Harry Eugene Claiborne" and a blank line, "as charged in the Count V in the indictment". Then it follows with Count VI and Count VII.

It's the same pattern. If you find from the evidence that the government has failed to meet the burden of proof imposed upon it by law in connection with a particular count in this verdict form, you would write in the words not guilty.

If, on the other hand, you find from the evidence that the government beyond a reasonalbe doubt, that the government has met the burden of proof imposed upon it by law as to that particular count or counts, you would write in the word guilty.

It will then be, the second page says "so say we all", and there's a place for your foreperson to sign it and a place, it's dated August with a blank and you'll fill in the date, whatever date you may arrive at your verdict. I'll mention also in connection with the charge that it will be given to you, you will find there are four typographical corrections that I have made and I have initialed them. They are nothing but type errors. You will recognize it right away.

I previously advised counsel, they have copies of the complete charge and I've gone over those corrections. Lastly, may I say, ladies and gentlemen, you have 14 jurors in that box and we do not proceed except with 12. Two of you are going to be either fortunate or unfortunate. I have not heretofore revealed who the alternates were but I must now reveal it because once you retire to consider your verdict, the alternates do not participate and whether that's good news or bad news to the alternates, I'll have to leave for their determination.

The first alternate was Mrs. Lois Kuzemchak and the second alternate was Gwendolyn D. Jones and you ladies will not participate in the case and you in due time will be taken back to the hotel and if you do not have ways and means to get home, just tell the Marshal and he will make some arrangements for you to get you home. If you have your car down there or something, why that's different.

But I want to thank you, ladies, for your services. The law just doesn't permit he me to let you now participate in the case and this is the way the ball bounces. So that you may be excused and asked not participate. You may have some personal effects in the jury room.

May I say to you, ladies, that members of the press are out there and they are going to hit hit you over the head right away. It's not fair to your fellow jurors for you to give any opinion. Just tell them, "The man in the black robe told me to keep quiet", and if they persis, come back and I'll take care of them. I just wanted to let you know what the situation is because you may have some opinion as to how a particular juror might feel or something like that.

But if you do, it wouldn't be fair to that jury because the juror should now begin consideration of this case in great depth. Thank you very much.

Before I can let the jury retire, ladies and gentlemen, of course the exhibits that were admitted in evidence will be brought to you by the Marshal, but they should be checked ahead of time by the lawyers to make sure that only the admitted exhibits are sent to the jury room.

But I want to know first from counsel, have I correctly read the jury charge to your satisfaction?

MR. SHAW: Yes, your Honor.

MR. GOODMAN: Yes, your Honor.

THE COURT: All right, you may retire at this time, ladies and gentlemen and may I say also I told the Marshal from now on that you are your own bosses as to when you recess tonight or this afternoon or whatever it may be or when you come back tomorrow morning.

The only thing I'd like to know is tell the Marshal, if you will, whatever time you're reconvening tomorrow morning and I'm not suggesting that you must reconvene tomorrow morning.

I'm just saying if your schedule goes into tomorrow and if your schedule goes into the next day, when you convene and when you recess will be entirely up to you.

If you want to have, rather than go out for lunch on a particular day, if you get into another day, if you want to go out for lunch at a given time that's up to you. If you want sandwiches and coffee or something like that sent in to you, the Marshal will attend to that.

You may want to keep on deliberating, so your foreperson, whoever may be elected as for foreperson should advise the Marshal of what your decision may be with respect to those matters so that we can be kept abreast of that.

Mr. Marshal, you may take with you the verdict form and the charge to the jury. I ask, ladies and gentlemen, you not start considering the case at this time until the exhibits arrive but of course you may attend to the first detail, electing one of your member as a foreperson. I hope you don't have too much disagreement with that matter. You may retire at this time.

(Whereuopn the jury duly retired to deliberate.)

THE COURT: The defendant, of course, reincorporates his exceptions to the Court's charge as stated at the time of the charge conference. Do we have any further exceptions?

MR. GOODMAN: No, that would include everything.

THE COURT: And the government doesn't any right to exceptions and did not except so we have no problem there. I will ask, then, gentleman, after I leave the bench if you will check with the courtroom deputy and let's get these exhibits in order and get them together by agreement and sent in. They should be checked carefully because we don't want any other exhibits to come in. All right otherwise? We will await the decision of the jury.

THE LAW CLERK: Counsel for both sides examined all the exhibits before being submitted to the jury. Mr. Johnston representing the defendant affirmed that all of the exhibits should be submitted to the jury and that no exhibits were submitted that should not have been. And the same for Mr. Shaw for the government.

(Whereupon Court recessed at 3:30 to await the decision of the jury.)

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, MARY E. BELL, Certified Shorthand Reporter Number 98, do hereby certify that I was present on the 9th day of August, 1984, at the hour of 9:00 o'clock a.m. thereof, in the United States District Court, District of Nevada, Reno, Nevada, and reported the proceedings in the within-entitled cause in stenotype notes, which were thereafter transcribed by me;

That the foregoing transcript, consisting of pages 1 through 118, contains a full, true and complete transcription of my said stenotype notes, and is a full, true and correct record of said proceedings had at said time and place.

DATED at Carson City, Nevada, this 30th day of November, 1984.

Mary E. Bell
MARY E. BELL, CSR, RPR, CP
Nevada CSR #98

1486

No. 84-1294

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-appellee

vs.

HARRY E. CLAIBORNE,

Defendant-appellant

ORIGINAL

RECORD IN FORTY-TWO VOLUMES

REPORTER'S TRANSCRIPT

IN FORTY VOLUMES

Appeal from the United States District Court for the

District of NEVADA (RENO)

CR-R-83-57-WEH

VOLUME 29

FILED DECEMBER 13, 1984

PHILLIP B. WINBERRY

Clerk of the United States Court of Appeals

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATE OF AMERICA,)
Plaintiff,) Case No. CR-R-83-57-WEH
v.) Reno, Nevada
) August 10, 1984
HARRY E. CLAIBORNE,) 2:30 o'clock p.m.
Defendant.)

. . . .

VOLUME VII

TRANSCRIPT OF VERDICT

BEFORE THE HONORABLE WALTER E. HOFFMAN, and a jury.

For the GOVERNMENT: STEVEN A. SHAW, ESQ.
WILLIAM C. HENDRICKS, III, ESQ.
JAN N. LITTLE, ESQ.

For the Defendant: OSCAR B. GOODMAN, ESQ.
WILLIAM J. RAGGIO, ESQ.
J. RICHARD JOHNSTON, ESQ.

Reported by: CAPITOL REPORTERS
Certified Shorthand Reporters
BY: MARY E. BELL, CSR #98
108 West Telegraph Street
Carson City, Nevada

CERTIFIED TO BE A TRUE COPY
[illegible] FITZGERALD, CLERK
[illegible] District Court

RENO, NEVADA, FRIDAY, AUGUST 10, 1984, 2:30 P.M.

-oOo-

(The proceedings continued in the abesence of the jury.)

THE COURT: Ladies and gentlemen, I've received a note from the jury which reads as follows: "Honorable Judge Hoffman, we the jury have reached a verdict", signed Mike L. Kinkel, foreperson. Anybody, of course, is entitled to see it.

Before the verdict comes in and is announced I wish to advise spectators, counsel and all persons present that we're still in court session, there will be no outcries of any kind with respect to the verdict. The Marshalls, of course, if there are any outcries, the Marshall will bring you before me after the jury has been excused. Call the jury, Mr. Marshall.

I received the note at 2:20, gentlemen, and as you know I had to get everybody lined up to let them know.

THE COURT: Good afternoon, members of the jury. I received a note at approximately 2:20 p.m. but it takes a few minutes to get the various personnel that must be here and that accounts for the slight delay. I take it everyone waives at this time the poll of the jury as to their attendance?

MR. GOODMAN: Yes, your Honor.

MR. SHAW: Yes, your Honor.

THE COURT: Members of the jury, the note indicates that you have agreed upon a verdict or verdicts in this case.

Mr. Kinkel, you are apparently the foreman; is that correct?

JUROR KINKEL: That's correct, sir.

THE COURT: Do you have the verdict?

JUROR KINKEL: I have it.

THE COURT: If you will present it at this time, please, sir.

The verdict appears to be in proper form. I shall read it ommitting, of course, the style of the case.

"Verdict: We the jury report our verdict in the above entitled case as follows: Count V, tax count, calendar year 1979, 26 U.S.C., section 7206 (1), we the jury find the Defendant, Harry Eugene Claiborne, guilty as charged in Count V of the indictment.

"Count VI, tax count, calendar year 1980, 26 U.S.C. section 7206 (1), we the jury find the Defendant, Harry Eugene Claiborne, guilty as charged in Count VI of the indictment.

"Count VII alleging false statement to Judicial Ethics Committee, 18 U.S.C. Section 1001, we the jury find the Defendant, Harry Eugene Claiborne not guilty as charged in Count VII of the indictment. So say we all. Signed Mike L. Kinkel, foreperson, dated August 10, 1984".

Ladies and gentlemen of the jury, this is your verdict or verdicts so say you all?

(Unanimous affirmative response from the jury.)

THE COURT: Will there be any desire on the part of counsel that the jurors be individually polled as to their verdict?

MR. GOODMAN: Yes, your Honor.

THE COURT: Ladies and gentlemen of the jury, the verdict will be again read to you and then you will be individually called by name as to whether this is your verdict and if it is not your verdict as to any particular count as I again read the verdict, you will say no. If it is your verdict you will say yes as you are individually called.

Rereading the verdict, "We the jury report our verdict in the above-entitled case as follows: Count V, tax count, calendar year 1979, 26 U.S.C. section 7206 (1), We the jury find the Defendant, Harry Eugene Claiborne, guilty as charged in Count V of the indictment.

"Count VI, tax count, calendar year 1980, 26 U.S.C. section 7206 (1), we the jury find the Defendant, Harry Eugene Claiborne, guilty as charged in Count VI of the indictment.

"Count VII, alleging false statement to Judicial Ethics Committee, 18 U.S.C. Section 1001, we the jury find the Defendant, Harry Eugene Claiborne, not guilty as charged in Count VII of the indictment. So say we all, signed Mike L. Kinkel, foreperson, August 10, 1984."

June I. Andrews is this your verdict?

JUROR ANDREWS: Yes, sir.

THE COURT: Michael E. Bothelho, is this your verdict?

JUROR BOTELHO: Yes.

THE COURT: Tanya J. Daoust, is this your verdict?

JUROR DAOUST: Yes.

THE COURT: Edna M. Harr, is this your verdict?

JUROR HARR: Yes, sir.

THE COURT: Is that the lady nodding her head down there?

JUROR HARR: Yes.

THE COURT: David Huntsman, is this your verdict?

MR. HUNTSMAN: Yes.

THE COURT: Mike L. Kinkel, is this your verdict?

JUROR KINKEL: Yes.

THE COURT: Christine S. Monti, is this your verdict?

JUROR MONTI: Yes.

THE COURT: It is your verdict, you say?

JUROR MONTI: Yes.

THE COURT: Patricia C. Nixon, is this your verdict?

JUROR NIXON: Yes.

THE COURT: David L. Page, is this your verdict?

JUROR PAGE: Yes.

THE COURT: Clifford F. Parsons, is this your verdict?

JUROR PARSONS: Yes, it is.

THE COURT: James R. Smith, is this your verdict?

JUROR SMITH: Yes, it is.

THE COURT: Christine Thomas, is this your verdict?

JUROR THOMAS: Yes, it is.

THE COURT: All 12 jurors have answered in the affirmative that it is their verdict. Are there any other formalities before I excuse the jury, gentlemen?

MR. GOODMAN: No, your Honor.

THE COURT: Ladies and gentlemen, I want to thank you for your patience and consideration of this case. It's an important case as we all know, important to the Government, important to the Defendant and I think that you have carefully reviewed all of the evidence and have done an admirable job in considering these matters that were difficult for you to decide, I'm certain.

With the thanks of the United States Government, the thanks of the Defendant, the thanks of all counsel, I will excuse you at this time. You will be returned to the hotel to get your possessions and so on. If any of you need transportation to your homes, I know nothing about where your cars may be, at least notify the Marshall and the Marshall will attempt to make arrangements for you to get home even if he sends you in a taxi cab.

With these comments, I appreciate it very much for your cooperation during the the time that you have been with me. I'd like to say I hope to see you again some day but I doubt it and after all, at my age time is rather limited anyway.

Thank you very much and you may be excused. May I say to you before you leave I know that you'll be pestered with reporters from the press, TV and so on. I cannot any longer seal your lips because that's not proper.

I can only say to you that I think that you would be better off like I said with the alternates to just tell them, "I respectfully refuse to talk about the matter. The man in the black robe has advised me to that effect and I'm going to follow his instructions". I think it would save you a lot of headaches and cut down the conversations. Thank you very much.

(Whereupon the jury was duly dismissed.)

Mr. Goodman and co-counsel for Defendant, how much time would you like to file appropriate motions? I assume they would be forthcoming, and I think that motions have to be filed according to the rules within seven days, isn't it?

MR. GOODMAN: That's my understanding, your Honor.

THE COURT: But I can extend that time and I would be perfectly willing to extend the time a reasonable period of time.

MR. GOODMAN: We would appreciate it if the court would give us two weeks.

THE COURT: All right. Two weeks extension or two weeks from today?

MR. GOODMAN: Two weeks from today.

THE COURT: I will give you two weeks from today within which to file any appropriate motions. May I ask is it the intention of either side to order a transcript because if so I would need the transcript for consideration of any substantive motions and I want to make proper allowance for that before the any sentencing procedure is fixed, any sentencing date and, of course, I believe the last time, gentlemen, I took up with you in advance the question of a probation presentence report and I've forgotten the name of the gentleman that Judge Browing asked me to refer the matter to except that he was from San Jose, California. You have his name, I'm sure.

MR. GOODMAN: I don't have it at my fingertips but I am aware of that message.

THE COURT: Is it still the desire of the Defendant to have a presentence report?

MR. GOODMAN: Yes, your Honor.

THE COURT: And I don't know anything about the individual who Judge Browing selected, but is there any question about that at all?

MR. GOODMAN: None whatsoever.

THE COURT: Because I wish to notify him to proceed forthwith to prepare the presentence report.

MR. GOODMAN: There's no problem with that, your Honor. And in response to the Court's question, yes, we would like a transcript of the proceedings for purposes of the motion. It would just be the transcript of the evidence. There's no need at this point in time to --

THE COURT: I take it that you do not want, one, the day that we spent together excusing jurors?

MR. GOODMAN: That is correct.

THE COURT: And you don't want any of the Voir Dire of the jurors which I think we spent a day and probably a couple of hours the following day for that?

MR. GOODMAN: For purposes of possible trial motions, those would not be necessary.

THE COURT: Therefore, you would only want the transcript, you do not need the charge because you have that and I assume -- I don't know where the original charge went. Did they take it with them, do you know, Mr. Marshall? It may be back in the jury room but that should be filled with the clerk if it is available now. If not, I can provide a copy. But I take it there's no need for the Court Reporter to write up the charge?

MR. GOODMAN: That's correct, your Honor.

THE COURT: And you do not want the opening statements, nor do you want the closing arguments?

MR. GOODMAN: At this point in time, that is correct.

THE COURT: Now, with those statements, Mr. Shaw and Mr. Hendricks and Mrs. Little, do you see any need for adding some of those matters which I suggested deleting to Mr. Goodman and to which he's in agreement?

MR. SHAW: No, your Honor, and perhaps I didn't hear the court mention the charge conference.

THE COURT: Oh, the charge conference you may need.

MR. GOODMAN: Yes, I think we would need that.

THE COURT: Include the charge conference, then. Other than that, I take it, then, there's nothing left. How much time would you estimate or could you estimate, bearing in mind that there were two reporters, the first reporter took I believe Wednesday, Thursday, Friday and Saturday. And you took Monday, Tuesday, Wednesday and today, which, of course, is very brief. Could you give me an estimate of the time required?

You don't want it before your motion, I take it?

MR. GOODMAN: Certainly it would be helpful to have it so we can supplement the motions. I'll been in a position where I can prepare the motion within the two weeks but for purposes of making reference we would like a transcript.

THE COURT: I take it, then, that after you get the transcript then I would permit you, if you care to, to supplement your motion, if you care to.

MR. GOODMAN: Thank you.

THE COURT: If it's permissible. I guess it is.

MR. GOODMAN: I think it is. At least the Court is extending time within which to file the motion. I think the Court could probably give us the opportunity to brief it in supplemental form.

THE COURT: Well, would two weeks after the receipt of the transcript be a satisfactory time for both parties to file such presentencing briefs on the motions that you care to do? Is that enough time?

MR. GOODMAN: Yes, it is.

MR. SHAW: Yes.

THE COURT: Now let's go off the record and let the Court reporter give an estimate as to her time and her partner's time.

(A discussion was held off the record.)

THE COURT: Well, I would like to set a tentative date for argument on the motion. Today is the 10th, the 10th falls on a Monday. Two weeks after that would be the 24th of September, but I'm available to come out here, gentlemen, I would assume that the presentence report could be completed. I do not read presentence reports before I act on motions.

I don't know whether I am wrong in that. I think I have a technical right to read a presentence report once there is, once it is prepared and the Defendant has been convicted. But I do not read them as a matter of practice until I have disposed of the preargument motions, presentense motions.

I can come out here most anytime, gentlemen, that you could agree upon in the later part of the week of September the 24th, the week of October 1st, the week of October the 8th. I don't think we should postpone it any longer and I'll take any date that you gentlemen are in agreement on, any two days perhaps because I might have to give consideration to the motion, but I would probably set the motions on one day and I would have to read the presentence report after that if I disposed of the motions and probably it would be set for two days.

MR. GOODMAN: Anytime in October.

MR. SHAW: I would ask then as early as possible in October. I have a trial on the 14th.

THE COURT: The 14th?

MR. SHAW: I have a trial on the 14th of October so as early as possible in October would be the most convenient for me.

MR. GOODMAN: The only impediment I know of, there are religious holidays for me around that time every year and I wouldn't want the Court to set it --

THE COURT: You'll have to advise me of that.

MR. GOODMAN: I don't have my calendar in front of me so I don't know.

THE COURT: My calendar here doesn't show the religious holidays. The West Publishing Company ought to do that when they give us these but they don't. I think they have the national holidays. Can you ascertain that by telephone, Mr. Goodman?

MR. GOODMAN: I'm sure I can.

THE COURT: Would you do that?

MR. GOODMAN: Certainly.

THE COURT: I don't want to conflict with any religious holidays.

I could do it -- Rosh Hashana is the 27th, Yom Kippur is October 6th.

MR. GOODMAN: Your Honor, anytime which would meet the Court's calendar between the 1st and the 4th would be fine.

THE COURT: Well, I was thinking about Tuesday, October 4th and Wednesday, October 5th but is that going to conflict with Yom Kippur?

MR. GOODMAN: Really depends on the plane flights more than anything else. If it would be possible to do it Monday or Tuesday?

THE COURT: Would you rather have Monday and Tuesday?

MR. GOODMAN: I would appreciate that.

THE COURT: Would Monday, September 30, be satisfactory for the argument on any motions?

MR. SHAW: October 3rd your Honor?

THE COURT: October 3rd, I beg your pardon?

MR. SHAW: Yes, that would be convenient with the

Government.

THE COURT: Is that satisfactory?

MR. SHAW: Yes.

THE COURT: And set Tuesday, October 4th for sentensing unless I feel that the motions have considerable merit in which event I will not proceed with the sentencing at that time.

MR. SHAW: Yes.

THE COURT: I beg your pardon, I was looking at September and the clerk has called my attention to the fact that October 6 is a Saturday and that's apparently Yom Kippur according to this book. October 1 is a Monday, Tuesday the 2nd, Wednesday the 3rd, October 4th and so on. Would Tuesday and Wednesday of that week give you ample time? That is the 2nd of October and the 3rd of October.

MR. GOODMAN: Yes, your Honor.

THE COURT: One other matter before we adjourn. Mr. Shaw, I assume but I don't know, but assuming there is an affirmance of the jury verdict on these two tax counts, numbers 5 and 6, isn't there a provision of the statute which either discretionary or manditorily requires me to assess investigation costs against the Defendant?

MR. SHAW: Yes, your Honor, I believe that's correct.

THE COURT: I haven't looked it up at all so I don't know.

MR. SHAW: I don't have the statute in front of me, your Honor, but that is my opinion.

THE COURT: I'm of the opinion one way or another by discretion or manditorily I'm called upon and I take it the Government's intends to file an appropriate motion for costs?

MR. SHAW: Yes, your Honor, we would move for that at the appropriate time.

THE COURT: I don't see any need for us to delay that matter. You now have ample time to prepare the cost items. Bear in mind that we had a dismissal of four counts and personally I don't think you're entitled to costs for those unless -- I haven't examined the law, I don't know anything about it, but bear in mind there was a dismissal of four counts which were not tax counts and then of course this Count VII is not a tax count on which Judge Claiborne has been found not guilty.

I think that you will have to not just take every item of expense and include it because my guess is that I am limited to the two tax counts, probably expenses of both trials in connection with the two tax counts only and I ask that you not send me in a bill of costs that will be astounding along that line because unless I am called upon in this type of case to impose costs, why I would think that it should be limited to Counts V and VI, both trials.

MR. SHAW: We will do the appropriate research, your

Honor, on that matter, sir.

THE COURT: Can you give some time limitation when you could get the bill of costs to me as well as to counsel so that counsel will have an opportunity to argue that matter at the time, at the appropriate time?

MR. SHAW: Perhaps three weeks, your Honor.

THE COURT: Three weeks would be satisfactory. I take it if you can provide that bill of costs to me in three weeks, an appropriate motion to have it assessed and I will take that up on the same day as the sentencing if I dispose of the motions. Do you understand, gentlemen? Is that satisfactory?

MR. GOODMAN: Yes, your Honor.

THE COURT: All right, gentlemen. I don't believe then there's anything else. Thank you and I'll see if I can head my way home to Virginia. Thank you very much for your patience and consideration.

Court is adjourned.

(Whereupon the trial was duly concluded.)

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, MARY E. BELL, Certified Shorthand Reporter Number 98, do hereby certify that I was present on the 10th day of August, 1984, at the hour of 2:30 o'clock p.m. thereof, in the United States District Court, District of Nevada, Reno, Nevada, and reported the proceedings in the within-entitled cause in stenotype notes, which were thereafter transcribed by me;

That the foregoing transcript, consisting of pages 1274 through 1289, contains a full, true and complete transcription of my said stenotype notes, and is a full, true and correct record of said proceedings had at said time and place.

DATED at Carson City, Nevada, this ____ day of September, 1984.

MARY E. BELL, CSR, RPR, CP
Nevada CSR #98

ORIGINAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

UNITED STATES OF AMERICA,)
)
Plaintiff,) Case No. CR-R-83-57-WEH
)
v.) Reno, Nevada
) October 3, 1984
HARRY E. CLAIBORNE,) 9:30 o'clock a.m.
)
Defendant.)
. . . .

TRANSCRIPT OF PROCEEDINGS

VOLUME II - PAGES 102 THROUGH 186

BEFORE THE HONORABLE WALTER E. HOFFMAN

TRANSCRIPT ORDERED BY: OSCAR B. GOODMAN, ESQ.

For the Plaintiff: STEVEN A. SHAW, ESQ.
WILLIAM C. HENDRICKS, III, ESQ.

For the Defendant: OSCAR B. GOODMAN, ESQ.
WILLIAM RAGGIO, ESQ.
J. RICHARD JOHNSTON, ESQ.

Reported by: CAPITOL REPORTERS
Certified Shorthand Reporters
BY: KAREN WITEK, RPR, CSR #195
108 West Telegraph Street
Carson City, Nevada

CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk
United States District Court
By
Deputy Clerk

RENO, NEVADA, WEDNESDAY, OCTOBER 3, 1984, 9:30 A.M.

THE CLERK: Criminal Action R-83-57-WEH, United States of America versus Harry Eugene Claiborne. Counsel ready to proceed?

MR. GOODMAN: Yes, Your Honor. Good morning.

MR. SHAW: Yes, sir.

THE COURT: Good morning, gentlemen.

Gentlemen, before we start, may I inquire, have counsel and the defendant gone over thoroughly the presentence report as prepared by Mr. O'Sullivan of the San Jose, California, probation department?

MR. GOODMAN: Yes, Your Honor, both Judge Claiborne and myself, as well as Mr. Raggio, have gone over the report very thoroughly.

THE COURT: And the government?

MR. SHAW: Yes, Your Honor, we have gone over the report thoroughly as well.

THE COURT: And may I inquire at this time whether there are any errors or omissions from the presentence report from a factual standpoint that you feel need be corrected?

MR. GOODMAN: Not from a factual standpoint, Your Honor.

MR. SHAW: Your Honor, the government finds no errors in the report, Your Honor.

THE COURT: All right. I will be glad to hear from you, then, Mr. Goodman or Mr. Raggio or Mr. Johnston -- since I see we have you with us today -- as to your views as to the appropriate disposition of this matter.

MR. GOODMAN: Thank you, Your Honor.

Your Honor, if it please the Court, this is a very emotional and trying time, not only for Judge Claiborne, but also for myself. I was raised in a family tradition where my father was an attorney in Philadelphia, Pennsylvania, and he had the opportunity at a certain point in time in his life to be designated a judge. It's all he wanted as far as the epitome of professional achievement.

However, he was so idealistic, when he was approached in a political situation that he had to make a certain contribution, he felt that that was not the way the system was supposed to work; that he had earned the position.

THE COURT: Was your father by chance on the Third Circuit Court of Appeals? I knew a Les Goodman, I believe.

MR. GOODMAN: No, he wasn't. With all deference to my opposition, believe it or not, he was a Deputy District Attorney in Philadelphia, but he was given the opportunity to assume a judgeship and he passed on that because he felt that you shouldn't have to pay dollars to attain such a position, if you paid your dues.

In light of that, we had discussions through my high school days, college days, and law school days, my father and myself, about what the system is all about and what being a judge is all about.

I came out to Las Vegas in 1964, and immediately upon arriving in Las Vegas I heard of a gentleman by the name of Harry Claiborne who was legendary in his time. He was a man who was admired and revered and adored by all persons in the legal profession, both friend and foe, and there was a reason for it, because I came to know then Mr. Claiborne as a mentor, as a teacher.

There was nobody whose word had as much integrity behind it as Harry Claiborne. There was nobody who worked on behalf of poor defenseless human beings, being the only buffer between those type of persons being eaten up by overzealous and aggressive persons in government. And I learned from Judge Claiborne that there's only one way to practice law, and that's to practice it as tough as you can, as fair as you can, and be as honest as you can in the system. Every time Judge Claiborne would make a representation to a Court, the Court didn't have to think one second about it, because the Court would accept that representation.

Judge Claiborne at that point in time was the ideal candidate to be thought of in the highest position that the public comes into contact with in the administration of justice, and that is a Federal District Judge.

I was honored on September 1st, 1978, when Judge

Claiborne asked me to be one of the speakers at his swearing in ceremony, and there was congeniality and conviviality, and there was much good spirit in the courthouse because somebody who was in touch with the common man was ascending to this high position, this position of awesome responsibility.

The remarks which were most meaningful to me that I heard did not come from Judge Claiborne on that day, but came from the then chief judge, Judge Roger Foley, who said to Judge Claiborne when he gave him the oath that he had to remember that because of the awesome responsibilities imposed upon a Federal District Judge, the District Judge had to learn the quality of tempering his decisions with mercy.

It was a very difficult concept to keep in mind, because of the fact that a District Judge does have such awesome power and responsibility.

Judge Claiborne listened to Judge Foley's words, and Judge Claiborne's record as a Federal District Judge was excellent, and is excellent. All persons who come into contact with him in the courtroom, both prosecution and defense, probation officers, marshals, litigants, realize that he treats them with dignity and respect, and the system worked beautifully as he was sitting on the bench.

I am offended that references have been made that somehow he breached a public trust, because the acts for which he stands convicted today, of course, are acts which have nothing to do with his duty as a judge. The way he performed his duties as a judge and dispensed justice is thought of amongst his peers, as reflected by the flow of over 50 letters from his colleagues to the probation office and to the Court, of respect, of gratitude, of a feeling that Judge Claiborne helped all of them along the way, whenever they turned to him for his guidance as being the sage of Nevada justice.

After he became a judge, a punishment which is far greater than any punishment that this Court could well or may well inflict, took place. It was a gradual punishment where Judge Claiborne was first the subject of rumors and then of charges created as a result of accusations by Joe Conforte, where throughout the community where he lived he was subject, in some quarters to those who did not know him, to ignominy and to scorn, to derision.

All of those who knew him, however, knew that the rumor and the innuendo and the speculation and conjecture was untrue. Nevertheless, when he went to trial, it was unfortunate that even though the majority of jurors chose to disbelieve such charges, that he could not have been completely exonerated by a jury. By virtue of the Government's concession as stated in the presentence report, that Conforte was not worthy of credible belief, they chose not to try the Conforte charges, but the path, the path that was left was a path which seared itself upon Judge Claiborne, and one which he will never be able to overcome.

The acts for which he was found guilty by the jury are acts which I do not understand, other than to try to speculate as to why he was as negligent in failing to review the documents and catching the mistakes, because in his heart and in my heart we both know that he made full disclosure of all of the monies which he is claimed to have omitted on the returns to those tax preparers.

THE COURT: Let's not argue the merits of the case. I have passed on that.

MR. GOODMAN: I understand that, Your Honor. My position is, as a concept that we know, one of the things that a District Court Judge may look for at the time of sentencing is a statement of some type of contrition or remorse. It's difficult to do when in your heart you believe that you are in fact innocent of the charges.

Judge Claiborne immersed himself in his day-to-day activities as a judge to the detriment, perhaps, of not taking care of his personal affairs. Every single night, every weekend, Judge Claiborne would take files home to study them, to work on them, to be prepared. When he went into his court, he knew what the litigation was all about. He was demanding upon the parties. He was a judge's judge. He is a judge's judge, and he desires to remain a judge's judge. He is a man who is strong and strong-willed. His strength will overcome the adversities which face him.

Your Honor, I ask you, because I know a little bit about your sentencing philosophy, having read a monograph which you prepared for probation officers as far back as 1968, where you suggested that perhaps retribution is not a proper motivation as far as sentencing is concerned, but sometimes you can't avoid it and it becomes intermixed with deterrence.

Your Honor gave certain examples. One of those examples was a professional person who failed to comply with the law as far as his tax returns were concerned, and I believe the sentence, at least as indicated in the monograph, reflected that he served some 90 days and that it had a deterrent effect in the community because many doctors came forward then and filed their returns.

THE COURT: Thirty-two doctors filed amended tax returns within 30 days after that sentence.

MR. GOODMAN: So I can appreciate where the Court is coming from, and I was very sensitive to the language that Mr. O'Sullivan used in his presentence report.

I take issue with Mr. O'Sullivan's claim that Judge Claiborne betrayed a public trust in the form of private self-serving manipulation to avoid significant tax liabilities. It's always been our position that the acts were not willful. There was no bad purpose.

Mr. O'Sullivan also suggests to the Court that because Judge Claiborne is a judge, he should not be treated more harshly than fellow citizens under the same set of circumstances. I submit to you that whatever lesson there has to have been learned from this very trying ordeal, it's been learned already. The public knows the type of situation which has been created here involving Judge Claiborne, and yet even in spite of that his colleagues, both from the bench and from the bar, ask Your Honor to temper your judgment with mercy and to consider the most lenient sentence that could be imposed under the circumstances.

THE COURT: Mr. Raggio or Mr. Johnston care to add anything to Mr. Goodman's comments?

MR. RAGGIO: May it please Your Honor, I hadn't intended to make any formal remarks because what my colleague, Mr. Goodman, has said I think speaks very clearly. What he has had to say, I think, emphasizes the concerns that we think should be understood by the Court in its determination.

I would only add this, as a personal note. As Your Honor has learned since this trial commenced, my background is one of a prosecutor. I was the District Attorney here for some period of 18 years, part of that as an assistant and 12 years as the District Attorney.

In the course of that, I dealt with many types of cases. I dealt with prosecutors across this country, and had the privilege of serving as the president of the National

District Attorney's Association. So I really don't speak to the Court either as the counsel in this case, as really a defense lawyer, as a criminal lawyer, but I suppose more from the standpoint of those who are prosecuting this case.

I think it should be said that in my dealings over these years with first attorney Harry Claiborne and then as Judge Claiborne, I have also found him to be an individual with a high moral concern and a high regard for the principles of law with which each of us is charged.

During the years that I was a prosecutor, I had occasion to try many cases against Judge Claiborne as a defense counsel. In each of these, he gave of himself without any measure of reluctance. Any person who he represented was represented not only fairly and with great concern, but with an overabundance of skill and effort.

In many cases in this county, in which Mr. Claiborne then was not a resident, he was asked to take on the most unpopular causes, because local counsel did not feel that they wanted to be involved. I can recall one case where a defendant was charged with killing two attorneys and wounding another.

THE COURT: Here in Reno?

MR. RAGGIO: That was here in Reno, Your Honor. There was great difficulty in finding anyone who would be willing to defend that individual.

The presiding judge called on Mr. Claiborne and without hesitation he took on probably one of the most unpopular cases that ever occurred in this area, and did a very skillful, lawyer-like job in representing that individual. That's only one example, because there are many.

Your Honor, I know that there are many considerations which you or someone in your position must review and consider in making a sentence, in passing a sentence. In this particular case, I agree that these are not offenses which were in any sense a violation of his duties as a judge. They didn't involve his performance as a judge.

The attendant charges which were flushed out of this case and, if I'm allowed a personal comment, which I think never should have been filed, did subject Judge Claiborne to a great amount of scorn and derision and bad feeling throughout the state, much of which I am sure remained without question throughout the second trial, even though you and all of us did everything we could to keep that out of it. But jurors can't be insulated from those kind of things. I am sure that that permeated the atmosphere in a great way.

What I am saying is, any kind of punishment that is imposed I am sure could not equal that attitude with which Judge Claiborne has had to remain under for a period of many, many months, which preceded the second trial in this case.

I would think probation would be worthy of consideration in this case. Judge Claiborne's good deeds are so great that I think they overcome any failing on his part in connection with the two charges on which he stands convicted. I certainly think he meets all the criteria which any Court either at the federal level or local level would consider as to whether a person, an individual would be or should be considered for that kind of release.

I say that from the standpoint of a prosecutor. If I were to measure as a prosecutor the facts of this case and the risks that are considered by sentencing judges, based upon my own experience, I would not have difficulty in arriving at that decision.

For the same reasons and the same comments which I adopt made by my colleague, Mr. Goodman, I would also suggest to Your Honor that this is a case which does merit that kind of consideration and certainly leniency of some sort.

Thank you very much.

THE COURT: Mr. Johnston, do you care to make any comment?

MR. JOHNSTON: I think not, Your Honor. Thank you.

THE COURT: I have just been handed a letter, very belatedly I might add, addressed to me, dated today, from Lawrence J. Semenza, a gentleman I believe testified in the absence of the jury on one occasion at the first trial.

I would be glad for anyone that wished to take a look at it. Otherwise, I will just file it with the various letters that I have received here.

MR. GOODMAN: That's agreeable, Your Honor.

MR. SHAW: That's agreeable.

THE COURT: I think the Federal Rules of Criminal Procedure provide that I should equally hear from the Government in connection with this matter as to the appropriate disposition of the case.

MR. SHAW: Thank you, Your Honor. I will be very brief.

As the Court knows, at the sentencings over a number of years the Court has been involved in, traditionally the defense attorneys stand up and talk about the background and the clean record of the defendant that stands convicted of the crimes, and the prosecution stands up and talks about the acts. Both sides kind of ignore the other aspects of it.

I can't speak to Judge Claiborne's background. I can speak to the crimes that he committed in this case. I think we have to keep some sort of focus on the issue that the jury found that Judge Claiborne deliberately and knowingly and intentionally violated two felonies that were basically perjury convictions, intentional false statements under oath for the purpose of personal gain to benefit by his own wrongdoing.

This is not a situation of negligence or some kind of situation that the defendant found himself in because he was so busy taking work home at night so he could be a judge's judge the next morning. There are plenty of judges in this country, as there are plenty of businessmen, lawyers, plenty of working men who work hard and try to do a good job with their lives, and because of that they don't fall into a trap where they end up committing intentionally criminal violations.

We don't suggest because Judge Claiborne is a judge he should be treated more harshly. On the other hand, Judge Hoffman, you should consider and it's reasonable for you to consider as part of Judge Claiborne's background and as part of what was in his mind when he was committing these offenses what his job was, like you would consider with respect to anyone else, the opportunities that this defendant had, the breach of those opportunities and the breach of faith that was placed in him by, certainly President Carter and by everyone else that was involved in having Judge Claiborne become a judge.

He should clearly have had a high regard for the law when he committed these violations and when he lied on these forms and when he made false statements to the Internal Revenue Service. Because he was a judge, he should have been more aware than the average man, perhaps, that what he was doing was a criminal offense, and great care should be taken in every statement he makes in any context, let alone statements that are made under oath in a perjury context.

We not only have a man who did not take care to avoid errors, but took specific care to commit these criminal offenses, and to hide those offenses from the Government. That effort to hide those offenses carried through to the testimony that he gave in this courtroom which the jury necessarily found to have been perjurious, and to at least one false document that the jury had to find was created by this defendant in order to cover up this crime, these two crimes.

I think with those considerations as well as the considerations of the defendant's background which should be considered, of course, by the Court, I think the Court should find that the appropriate disposition of this case would be a significant period of incarceration.

I wouldn't presume to suggest a particular period to Your Honor. The Court has greater expertise and certainly it is the Court's responsibility to arrive at what a specific disposition should be, but certainly in light of the presentence report and the other information that related to the average sentence that has been given both from the State of Nevada and nationwide for this type of crime, we would certainly think that somewhere in the average would be appropriate, in light of the defendant's background and his opportunities that have been given to him; that certainly a sentence in excess of the average would not be inappropriate.

Thank you.

THE COURT: Gentlemen, would there be any desire on the part of counsel to introduce any evidence at this hearing with respect to the matter? I may add that I have read every letter. As Mr. Goodman said, I haven't counted them, but there were many. Some few originated outside of Las Vegas, but the majority, of course, came from the Las Vegas area, which is understandable.

If there's any evidence that you care to put on by way of mitigation, I should be glad to hear it at this time.

MR. GOODMAN: Your Honor, we do not have any evidence. We believe that the presentence report set forth with detail and specificity the good deeds and the good acts of Judge Claiborne, and the Court is well aware of those.

THE COURT: I would be happy to dictate into the record the names of the people who wrote letters in behalf of Judge Claiborne, but they have been available for inspection and some of these letters, of course, I assume were communicated to the probation officer with a tacit understanding of some type that they would be of a confidential nature.

I don't desire to embarrass anyone along that line, but the letters are considered as a part of the report. Is there any desire that I should dictate into the record not the letters themselves, but who the writers of the letters were that spoke favorably for Judge Claiborne?

MR. GOODMAN: As long as they are part of the record, we see no need for that.

THE COURT: All right. Let Judge Claiborne come forward to the podium, please.

MR. GOODMAN: Your Honor, will Judge Claiborne be permitted the right of allocution?

THE COURT: Yes, I am going to give it to him right now. Yes, indeed. That's why I wanted him to approach the podium, so he can be heard.

Harry Eugene Claiborne, have you anything to say as to why the Court should not now impose sentence upon you?

THE DEFENDANT: No, sir.

MR. GOODMAN: No, Your Honor.

THE COURT: Would you like to make any comment yourself?

THE DEFENDANT: Yes, I would, Your Honor.

I know from experience that the Court looks at the defendant at this time of the proceedings in a certain manner as to determine, as Mr. Goodman has put it, contrition and remorse.

I do have remorse. Not for any illegal act that I have committed, because I have committed none. I am remorseful for any embarrassment that my indictment and my trial may have caused the judiciary which I served well and faithfully. For that I am exceedingly remorseful.

I could not conceive that Your Honor this morning in your actions could hurt me more than I have already been hurt.

My life has been virtually destroyed, and not because of illegal and wrongful acts. I do not wish to belabor any sensitive areas, but the amendment of the rule is couched in such a manner, as we all have been aware, that somewhere the defendant be allowed to talk without it being merely an answer to questions and within the confines of the restrictions laid down by the Rules of Evidence.

I am not here, Judge Hoffman, because I violated the law. In the 30 years that Joseph C. Wright did my books, there wasn't a single year that I failed to make a full disclosure of every single facet of my financial transactions and my income, and he so said in this trial.

The entire period that he was my accountant, I dealt with him honestly, and he so said. Not only that, but he also said that I cautioned him time and time again that we would cut no corners on my taxes. I followed that procedure with the only other accountant I ever had, Mr. Watson.

I labored many years in the vineyards of justice as a lawyer. I defy any man in the world to say that I didn't live up to those responsibilities as a lawyer as fully and completely as it is humanly possible for a lawyer to do.

I have handled more indigent cases than any man living. Not one time did I ever seek out a judge and say, "You're putting too much of a burden on me."

One year I was appointed nine times by the Federal

Court of Nevada before we received any funds for representing people, which was almost a third of my available time for productivity in my private practice. It went for free with not one complaint, because I took as valid that oath that I would defend the poor and the oppressed, and that was a part of my oath. I defy any man to say that I did not live up to that fully.

I took practically the same oath as a United States District Judge, and I defy any man to say that I was in any way indiscreet with the obligations and responsibilities and trust as a United States District Judge of this district.

One of the best things that have come about in this entire thing are the number of prosecutors who have come to me and said, "You were always fair to the Government, and you were exceedingly fair to the defendant, and you could always get a fair trial in your court."

Whatever happens to me is not going to change that. Whatever you do with me is not going to change that because the first obligation of life is to be true to yourself, and that I have been. Whatever any Court does with me or whatever any institution does with me in the future in no way will detract from that, because I will be happy with the fulfilling thought that both as a lawyer and a judge, I lived up to the expectations and obligations that a lawyer and judge should do, and be.

I am not perfect. My God, I am not perfect. I've got more faults than you can shake a stick at. I am sometimes blunt with individuals, and the only redeeming feature that I may have for my many, many, many faults is the fact that I carried on the bench a philosophy.

That philosophy was not created from reading books, but that philosophy was created by standing side by side a third of my life with individuals who could not have possibly fought the giant juggernaut of the Government without the assistance and without the help of someone who was strong, someone who would not relent, and someone who believed in justice. Not just 95 percent, but 100 percent.

Those countless hundreds and hundreds of those little people that I stood beside in the courtroom and fought for against the great power of the Government, the army of investigators poured in to the cases against them, with a fathomless bounty of money to spend to try to put him behind bars, made me realize one thing, that the little person, the little person in this country of ours, the little person that politicians talk about on the Fourth of July and quickly forget, the little person when he goes against the Government, whether it be civil or criminal, when he takes on an agency of the Federal Government of the United States, is facing unlimited power; he is facing unlimited money; he is facing unlimited manpower.

THE COURT: Judge, I don't want to interrupt you --

THE DEFENDANT: I must say this.

THE COURT: Well, you can make all the speeches you want to, but they do not impress me. Now, if you want to talk about what I should do with you, I am interested. Otherwise, you can make your speech any way you want to.

THE DEFENDANT: All right. It became such an awesome situation to me that I became fearful as to whether or not justice was really justice. While I was one man, I tried to equalize it to the best that I could, with those that I represented, but at the same time I was constantly aware of the army that I was not representing facing the same situation.

I made up my mind that I would do my best if I ever became a Federal Judge to see that the little person could equalize that disadvantage the best that the judge could do, because the Federal Courts, as you have spent your lifetime in, is the only place they have to go where they can get true justice.

And I followed it. And in following that philosophy, I made a lot of enemies because I criticized a lot of people in the Justice Department, a segment of the Justice Department. I came down hard on them. If I had not, I would not be here today, Judge Hoffman.

For four solid years, for four solid years they have dogged me, they have harassed me, they have investigated me.

They have uncovered every rock in my county to look for any misdeeds in the past. They have indicted me for things I have not done. They have tried me for wrongs that I did not commit, and a jury has convicted me of two counts of wrongs that I did not commit.

I never one single time in my life signed a tax return that I knew or had knowledge was not correct. Never. No year. Including the two years in which I am on trial.

The Watson return is an absolute -- You, Your Honor, read that return and you, Your Honor, made certain statements about the return and about his ability. Judge Hoffman, I am not a stupid man. They claimed when I signed that return that I knew that it was incorrect, that I knew it was wrong, that I had knowledge that it was wrong, and therefore I falsified it.

Any human being with any intelligence whatsoever would have read that return, one page of which contained a note to Mr. Watson himself from somebody which indicated it was a work paper. The Schedule D which treated my $88,500 figure that I had given him as an accounts receivable and then treated it as a loss under a capital gain theory appeared to be a work paper.

No one in the world that knows me knows that I would have signed that document if I had studied it, if I had read it thoroughly and if I had seen it or become aware of it.

I am sorry I can't say I'm remorseful for these acts, but how can you say you're remorseful for these acts, other than how it affects others when you feel that you did nothing wrong?

I am guilty, not of the charges laid in the counts in this indictment. I am guilty of being reckless with my own personal affairs, and I guess the reason that I was a good lawyer and I guess the reason I was a good judge -- and I am going to say I was a good judge. I defy any man to say I was not -- was because I spent all of my time there.

Money meant nothing to me. The Government has told this Court that, in fact just yesterday and in a memorandum, that my reduction in the money that I had after I took the bench was so drastic and that my lifestyle was such that I had to cheat on my taxes. My tax return was filed in June of 1981 on the 1980 year; and at the time my return was filed, I had over $400,000 in cash in banking institutions.

As it says in the probation report, it calls me a workaholic, and that's what people referred to me as. And he asked me if I thought I was. I had to think a minute or two, and then it was the first time in my life it occurred to me that that's exactly what I was.

It seemed as I looked back, nothing else mattered to me. Mr. Wright said that not one single time could he remember in that 30 years, that we sat down together and went over the return after it was prepared. He said there might have been one year, but he couldn't remember if that was true or not. I take my return, I take it to my home or my office, and I would file it.

THE COURT: What is the purpose of this speech that you are making?

THE DEFENDANT: The purpose of this is so the Court should know something about me. You are about to hand down, make a decision which is my whole life.

THE COURT: I understand that.

THE DEFENDANT: And the very reason, and as you well know, for the amendment of the rule is that a defendant should have an opportunity to speak his peace fully and completely.

THE COURT: The rule has been in effect for some many years, I might add.

THE DEFENDANT: I realize that.

THE COURT: But the amendment to the rule, it's been in existence ever since I have been on the bench, 30 years ago.

Well, go ahead. I think I must put some limitation on you, Judge. After all --

THE DEFENDANT: I am about through.

THE COURT: All right.

THE DEFENDANT: I was hopeful that the Court would hear me out, so that you would know something about me. You don't know anything about me. You just know a little bit of what this was about.

THE COURT: All I know is what I heard in this courtroom, plus the presentence report and the letters you received.

THE DEFENDANT: That's why I'm saying this, because you should know something about me.

As I said, I didn't pay any attention to them anymore, the returns. I had no occasion to. And money was not important to me. Ever in my life, money has never been important.

So I conclude by saying that I have sat where you sit, and I know the duty that you have, and I know what your responsibilities are, but I want this Court to know that I resent any statement that says, because it is not true, that ever, ever have I been unfaithful to the public trust.

I am not a public officer that has embezzled money from the taxpayers and I am not a public officer that has violated the law dealing with its responsibilities and duties in office, or criminality in representing the State. I am a defendant, as claimed by the Government, for a personal act dealing with my income tax, on which there are numerous decisions that say that it does not involve moral turpitude.

So I expect to be dealt with on that basis, not on the basis that I'm a Federal Judge who violated the Federal law and having to do with the responsibilities in his duties and his obligations, because that is not so.

That's all I have, sir.

THE COURT: On Count V of the indictment, it is the judgment of the Court that the defendant, Harry Eugene Claiborne, pay a fine of $5,000 and stand committed until the fine is paid, and that he be committed to the custody of the Attorney General to be by him or his duly authorized representative confined in such institution as he may direct for a term of two years, unless sooner released by operation of law.

On Count VI of the indictment, it is the judgment of the Court that the defendant, Harry Eugene Claiborne, pay a fine of $5,000 and stand committed until the fine is paid, and that he be committed to the custody of the Attorney General to be by him or his duly authorized representative confined in such institution as he may direct for a term of two years, unless sooner released by operation of law.

The sentence of confinement on Count VI of the indictment shall run concurrently with the sentence of confinement imposed on Count V of the indictment. The fines imposed shall be separate and not concurrent, making a total fine on Counts V and VI of $10,000. The sentences of confinement are imposed under the provisions of Title 18, Section 4205(b)(2), United States Code, and the defendant may be released on parole at such time as the Board of Parole may determine.

The Court recommends that the defendant be confined at the Federal Institution at Maxwell Air Force Base, at or near Montgomery, Alabama. The sentence shall commence on the 15th day following the date of the imposition of this sentence, unless the defendant files a timely Notice of Appeal. If an appeal is filed and if a judgment is subsequently affirmed, the sentence shall commence on the 15th day following the receipt by the District Court of a mandate from the United States Court of Appeals for the Ninth Circuit, unless otherwise ordered by the Court of Appeals.

If the defendant must report to the Federal Institution for confinement, the defendant shall have the option of surrendering to the United States marshal at twelve o'clock noon on the 15th day as aforesaid, at Las Vegas, Nevada, for transportation to said penal institution or, at the option of the defendant, he may voluntarily surrender himself at the designated Federal penal institution at twelve o'clock noon on the 15th day as aforesaid, at no expense to the United States for his transportation, meals and lodging while in transit.

Gentlemen, I am not required, of course, to give any reasons for my sentence, but I have elected to make a few brief comments.

I have been impressed by the many favorable letters written in your behalf, Judge Claiborne. While many of your good friends still insist upon your innocence, as do you, they candidly admit that their knowledge of the facts is largely confined to the newspaper accounts they have read. Since essentially all persons who suggested that you were wrongfully convicted are from Las Vegas, I can appreciate how and why these persons are of that belief.

However, these people did not hear the testimony, which in my opinion was overwhelming, as to your guilt on Counts V and VI on the indictment. While I have no idea as to what the jury thought, it is obvious that the jury was convinced beyond a reasonable doubt as to your guilt on these two counts.

The letters received from your friends and associates together with your present age convinces me that no useful purpose would be served by imposing a greater sentence which could reach as much as six years confinement. The period of confinement imposed by my sentence is the same that was recommended by the probation officer designated to prepare the report.

As to the total fine of $10,000, I can only say that I have examined the financial statement. It appears that you have a net worth of approximately $370,000 to $380,000. I can only say also that Congress must have been of the opinion that the fines imposed by District Judges in tax violation cases were too low in the past, as on September 18th, 1982, Congress increased the maximum fine to be imposed upon individuals violating certain tax laws from $5,000 to $100,000 for each count on which an individual defendant is convicted. The increased fine is not applicable to your case, but the increase is evidence of the fact that Congress does not think lightly of tax violations.

To consider a sentence of probation for you would not be, in my judgment, in the public interest. Indeed, if a Federal Judge violates the laws relating to income taxes and is thereafter placed on probation, such a sentence would be a mandate for judges to impose sentences of probation in all tax cases.

In my own view, as Mr. Goodman previously noted from past writings, lawyers, accountants, doctors and top business executives should always be confined for some period of time if they violate our tax laws. To this list must now be added the Federal Judges.

It is a sorry day for you, Judge Claiborne, but it is even a sorrier day for the Federal judiciary.

Our system of tax laws requires voluntary compliance by all taxpayers, and that voluntary compliance requires integrity if our nation is to survive. I cannot permit a colleague of mine such as another United States District Judge to be considered for probation under such circumstances as were fully revealed by the evidence in this case. I realize that your career may be substantially shattered, and to this extent I am sympathetic with you, but you must remember that it is all of your own making.

We will take a five-minute recess, following which I would like to hear from counsel for the Government as to the propriety of continuing Judge Claiborne on his present personal recognizance, pending an appeal. I assume there will be one. And I must also notify Judge Claiborne of his right to appeal, which I think is an idle gesture, but I am required to do it.

MR. GOODMAN: Your Honor, we have a prepared Notice of Appeal which we will be filing with the clerk.

THE COURT: You may file it at this time. We will take a five-minute recess.

(A recess was taken.)

THE COURT: What position does the Government assert with respect to Judge Claiborne remaining on his personal recognizance bond pending final disposition of the matter?

MR. SHAW: Your Honor, we would have no objection to the defendant continuing on his personal recognizance.

THE COURT: Let it be understood then that his personal recognizance bond heretofore given in the sum of $5,000, I believe it was, although I have forgotten --

THE DEFENDANT: That is correct.

THE COURT: -- be continued pending the final outcome of any appellate process. I believe the Notice of Appeal has already been filed.

MR. GOODMAN: Yes, Your Honor, I did file it.

THE COURT: Well, is there any necessity now for me to give Judge Claiborne the required information about the Notice of Appeal?

MR. GOODMAN: I can assure you that Judge Claiborne would waive that. It's been fully understood.

THE COURT: I take it you waive that?

THE DEFENDANT: Yes, I do waive it, Your Honor.

THE COURT: I don't see any necessity of going through a futile ceremony along that line.

Now, gentlemen, we have pending also the costs of the prosecution which must be imposed upon Judge Claiborne.

Yesterday I submitted a memorandum to you as to my initial views, but I must say to you that as I indicated in the memorandum, it is not final. Both of you briefed the matter and sent me the copies of your briefs as filed on the costs of prosecution. I read them at length and tried to do what little extra work that I could find on the subject. There's not too much available.

First, may I ask the Government as to their views as to my memorandum that I filed and whether they can convince me that I am in error along certain lines. Then I wish to, of course, ask the defense for their views. I would assume that initially the burden is on the Government to show the costs of prosecution, and that's the only reason I call upon them at this time.

Do you have any views on the subject, gentlemen?

MR. HENDRICKS: Yes, sir. If it please the Court, Your Honor's order of assessment and costs of prosecution disallows costs of the prosecution of the first trial. That assessment recognized the relative lack of case law, and recognized the only recent case in that area, a Federal case by Judge Godbold to be one which would not indicate the desirability or the propriety of assessing those costs. We do not take exception to that determination by the Court.

THE COURT: We need not go any further into that matter then. I will reaffirm my previous order that I filed on yesterday with respect to the costs of the first trial, namely that the Government will have to pay the cost of that.

MR. HENDRICKS: Now, Your Honor, as to the various other items, there is one matter that we would like to address, and that is the cost of preparation of the various charts.

The Court's position in the Court's order is that since the charts did not contain an independent analysis but were simply a cumulation of evidence, which evidence was already introduced, that they did not themselves constitute anything more than rather a summary of fairly clear evidence and should not be assessed as costs payable by the defendant.

It is our position, Your Honor, that in a case of this sort there was a substantial amount of documentary evidence introduced in the trial, evidence which had the jury not had the benefit of the charts, might have been confusing. It is our position that the charts were a worthwhile and valuable tool for purposes of allowing them to make a calculation which although it was straightforward, which was one that was necessary to the case and which calculation was not included in any other documents or evidence which were introduced.

Since the charts in our view were important in that regard, we would respectfully assert that the cost of the preparation of the charts as to 1979 and 1980 should be chargeable to the defendant. We would agree with the Court, however, that the blow-ups were largely argumentative, used for argumentative purposes and so we take no exception to the Court's ruling in that regard.

The charts we do believe sufficiently contain a deliberative process, a process of calculation which deserves consideration by the Court.

THE COURT: Of course, I did not know at the time these charts came in evidence in the second trial whether they were the same charts, and I believe they were, that you attempted to use in final arguments at the first trial. In the absence of agreement, I did not permit them because they had not been introduced in evidence at the first trial. I take it they are the same charts.

MR. HENDRICKS: They were exactly the same charts, Your Honor. I believe there was some discussion during the course of the trial on that matter and it was agreed that they were the identical charts which we sought to introduce during the first trial.

THE COURT: Now, under the circumstances, I also did not note anything from the charts other than the addition of figures, the adding up of the checks. What else was there of educational value in there that showed --

MR. HENDRICKS: The charts for 1979 contained three categories. One were documents -- two principal categories. Checks received from Annette Qunitana and checks received from James Brown, ex-law partner. They contained categories which indicated which of the checks had been cashed and which of the checks had been deposited. They demonstrated that none of the checks which had been cashed were reported.

They also contained totals of all of the checks, which totals were necessary for purposes of comparison of the figures asserted in the counts of the indictments.

THE COURT: Was that not merely a summarization of the evidence?

MR. HENDRICKS: It was a summarization of the evidence, Your Honor, that's correct. But it is our position that that summarization of the evidence, although the jury certainly could have done it, there was a process internal to the document, that summarization process which was a significant process and that it was helpful to the jury in this case, although as the Court notes, this was not a case of the same kind of complexity as a net worth case.

Nevertheless, there was a substantial volume of evidence, of documentary evidence introduced at the trial. I think that the charts served a reasonable value.

THE COURT: How many checks were there all told for 1979? Weren't there about 14?

MR. HENDRICKS: That's correct, Your Honor, something in there.

THE COURT: Some of those, a few of those had been deposited in banks.

MR. HENDRICKS: Yes, sir. That's correct. There were a fewer number for 1980.

THE COURT: There were about five, I think, were there not, for 1980?

MR. HENDRICKS: That's correct.

THE COURT: Answer my question that I directed to you. If this case had been tried before me alone, would you have gone to the expense of 3,000 odd dollars to prepare charts for my benefit?

MR. HENDRICKS: Well, respectfully, Your Honor, I think we would have. I am not sure given the Court's views as expressed in the order that we would have, but if we had not been aware of the Court's view that these were completely unnecessary, we no doubt would have gone to the expense and trouble of preparing the charts.

Of course, I think it should be considered that the Court has had 30-some years of experience, much of that no doubt in cases involving documentary evidence, and the Court is in a position during the course of the testimony to follow the evidence in a fashion which no doubt exceeds, greatly exceeds the quality of attention given or exceeds the ability of the average juror, so that the necessity for preparing this kind of chart showing accumulation of cost for the Court would no doubt have been less than I think the reasonable need to cull out important figures for the jury.

THE COURT: All right. If you finished your discussion of the chart matter, may I inquire, I have not had the opportunity -- I have seen the transcripts of the first trial which are now essentially eliminated for the purpose of assessment of costs, except what occurred after there was a declaration of a mistrial when the jury didn't agree, when both sides said, as I recall, that they wanted the transcript for the purposes of the second trial.

Now, apparently the defendant raises a question about, he wants a page-by-page analysis of the transcripts rather than a count-by-count analysis. I am not adverse to that. I realize that court reporters are paid by the page. There's no question about that. So the actual cost would be on a page-by-page analysis.

However, Courts have seen fit to divide, allocate it on a count-by-count basis. Do you have any idea yourself, Mr. Hendricks, with respect to the first trial, as to how much of the testimony, the percentage of the testimony was devoted to Counts V and VI on which the defendant finally was convicted?

MR. HENDRICKS: That is difficult to say, Your Honor, but in all candor I would think -- we thought two-sevenths was a reasonable way in which to proceed. But I would imagine that if an analysis, page-by-page analysis were performed, because of the extensiveness of examination and cross-examination of witnesses that related to Counts I, II and III, that the likelihood is that, on a page-by-page analysis, that Counts V and VI would probably be somewhat less than two-sevenths of the total volume of testimony in the first trial.

THE COURT: Well, my next question is, on the cost of the transcript of the second trial which I have not seen at all. I know it was here yesterday, but I have not examined it, and the Government has a claim there of $3178.70 as the Government's share.

Did the transcript of the second trial include the testimony of witnesses who testified with respect to Count VII, on which the defendant was acquitted?

MR. HENDRICKS: May I have just a moment?

I understand that it did, Your Honor. Principally the individuals involved would be Judge Decker and the secretary, Annette Hensley. The Court also, I recall, raised a question regarding Judge Decker and Annette Hensley.

THE COURT: I can understand the testimony perhaps of the lady who brought in the financial disclosure form which revealed, I think, some 21 or $22,000 of income received by Judge Claiborne for the year 1979. To that extent I think it would be pertinent to and relevant to Count V, but you certainly wouldn't need the expenses of both Judge Decker and the lady who served as secretary to the committee.

MR. HENDRICKS: Well, Your Honor, the lady, Annette Hensley's testimony was necessary in order to secure the admission of the document in evidence. Judge Decker is not a proper custodian for those documents and only receives them from Washington D.C. after they are submitted there.

THE COURT: I say, I am inclined maybe to say that Miss Hensley's expense may be properly chargeable to Count V of the indictment, but I fail to see how Judge Decker's expenses would be properly attributable to either Count V or VI, once the document came in evidence, which it did on the testimony of Annette Hensley, I believe her name was.

MR. HENDRICKS: It is our position, Your Honor, in that regard that Judge Decker, his testimony you can really describe as testimony which related to the significance of the form. It gave the jury some insight into the materiality or significance of the form and especially as to Count V, Judge Decker's testimony was necessary for purposes of demonstrating that this was not just some insignificant matter, a piece of paper which was likely to have been generated without any thought.

THE COURT: But the only crucial point with respect to the materiality of the testimony of either the Hensley lady or Judge Decker, was the fact that Judge Claiborne had represented on the 1979 form, I believe, that he had received roughly 21 or $22,000 from legal fees instead of representing 41 or 42,000, which was the figure, the actual figure brought out by the checks. So that the only crucial point of either Hensley or Decker would be that phase of it in so far as Count V is concerned. Isn't that right?

MR. HENDRICKS: Well, Your Honor, it's our view that, I don't mean to be redundant, but Annette Hensley's testimony just related to the mechanics of the receipt of the document. She is really not in a position to describe the materiality or the significance of the form. Judge Decker's testimony related to the background and the significance of the form, and we think that that should have been considered, properly considered by the jury in considering the state of mind of

Judge Claiborne when he personally prepared the 1979 form, during the critical period in the spring of 1980 when he was providing figures to different people regarding his 1979 income.

THE COURT: Well, the materiality of the form, the financial disclosure form was crucial on Count VII on which Judge Claiborne was acquitted, but I don't see the materiality of the form to be so essential to prove what appeared in Judge Claiborne's financial disclosure form which was signed by him and filed by him, except to the extent of the 22,000 or whatever that figure is that appears in answer to one of the questions.

MR. HENDRICKS: That's correct, but it is our contention that if the jury had a proper understanding of the materiality or the significance of that statement that he made in May of 1980, that that was proper for them to consider that in determining whether that statement was just an offhand report which was not given consideration by the judge, or whether it was the kind of statement that he probably would have considered and made in a considered fashion.

THE COURT: Do you have any support other than what I have cited in this order with respect to the allocation, whether it be two-sevenths and five-sevenths and one-third and two-thirds, so on?

MR. HENDRICKS: No, sir, we do not believe it has been addressed before with this kind of particularity.

THE COURT: I have by this order imposed upon the defendant, the defense counsel, the burden of wading through that if they are willing to do so, or else otherwise reach some agreement as to the allocation. If necessary, I will do it. I hate to undertake it. That requires a page-by-page analysis.

All right. With tongue in cheek, I allowed you the service fee of the marshal, even though the subpoenas were served by the FBI and IRS. I think that as a matter of first impression, although it doesn't involve but about 42 or $43 for those that have actually been served who attended the trial and testified. Now, it would be increased somewhat as to any witnesses that I may determine were relevant to the prosecution necessary for the prosecution, but did not testify.

MR. HENDRICKS: We do not take issue with any of those determinations, Your Honor.

THE COURT: $100 fee for the marshal I have allowed. That is by statute. The docket fee, I don't understand there was ever any contest about that. The testimony of witnesses, witness fees and expenses for the testifying witnesses was considered and except for the possible exception of Judge Decker and Annette Hensley, which I leave open for the present, I don't think there was any contest about the remaining expenses, except that the defendant called for strict proof.

Now, I have not examined the vouchers that appear in the records of the marshals service. I have granted leave to the defendant to examine them and question them. I see no need for me to examine the vouchers. Certainly defense counsel, as able as they are, may call that to my attention, if there are any errors.

We come then to the witness fees and expenses for witnesses not testifying. Now, that requires an examination of your bill of costs that you submitted here.

MR. HENDRICKS: I believe that's on page four, Your Honor.

THE COURT: Bonnie Bohan, B-o-h-a-n. She was served but did not testify at the second trial. Daniel Bohan, who I assume perhaps is her husband, was likewise served but did not testify.

MR. HENDRICKS: Your Honor, Daniel Bohan is the husband of Bonnie Bohan. We anticipated that during the course of the defense case character witnesses would be called. We anticipated putting certain questions to those character witnesses in the nature of, "Have you heard," or "Did you know." We also anticipated that defense counsel would, with respect to those questions, want a factual predicate established for the Government's good faith in going forward with those questions.

As a consequence, we took the precaution of securing the Bohans so that if the Court wanted to hear predicate testimony, that it could do so without any inconvenience to the presentation.

THE COURT: I don't want you to reveal anything in open court that might cause any further problems in connection with this matter, because --

MR. HENDRICKS: Yes, sir, I will not.

THE COURT: It is not that important, but -- I don't have any idea, anything about the Bohans. I mean they are complete foreigners until I got this bill of costs. I never heard their name mentioned.

MR. HENDRICKS: To my understanding, Your Honor, the name has never been mentioned in this court or at any other place in front of Your Honor.

I simply wanted to point out the fact, that's why they were secured, to facilitate the proceedings and to provide a predicate, assuming a request had been made, and we believe considering the nature of the testimony that it would have been appropriate for such a request to be made.

In addition, the Bohans were also thought of as possible rebuttal witnesses, rebuttal witnesses in the nature of an anti-character witness. That was the reason for their having been subpoenaed. As it turned out, the defendant did not elect to use character witnesses during the course of their case, and obviously the Bohans' testimony was never required.

THE COURT: We were here and you have claimed their expenses of rate at the 395 for Bonnie and 395.10 for Daniel Bohan. The service fee was two dollars.

Well, I don't yet know what they know about Judge Claiborne's reputation. That's the trouble, I can't put my finger on anything. I don't want you to disclose it here in open court.

If you wish to go in chambers, why, we can do so if there's any need to. Stated otherwise, I don't want a repeat of what occurred once before on an in limine motion during the first trial of this case.

MR. HENDRICKS: Yes, I simply wanted it to be clear that if the Court would like a proffer, we would be more than happy to provide it in an appropriate fashion. We wanted to make clear, though, all of the witnesses who were subpoenaed were people subpoenaed by the Government with every reason to believe that their testimony might reasonably be necessary, or that it would be necessary at the trial, and none of these --

THE COURT: Some courts have said there's a presumption that a witness not testifying but summoned by the Government is not a material witness. I can't say that the Ninth Circuit would apply that presumption, but I believe the Fifth Circuit has applied it.

MR. HENDRICKS: Well, Your Honor, in the case of the Bohans, what we have here is a trial involving allegations which constitute a negative comment, really, on the character of the defendant in this case. I would think if the Court were to do an analysis of similar cases involving allegations of misconduct against people occupying high positions, that the tendancy would be in the defense of those cases to put character witnesses on.

That's the kind of thing that if the Government did not anticipate, that the Government would obviously not have conducted itself in an appropriate fashion. We attempted to anticipate it and get those people here so that we could resolve any questions that might be raised regarding the predicate for questions which necessarily would have been --

THE COURT: Of course, at the first trial, no character witnesses were introduced. I don't say that in any sense that that would be binding upon the Government for the second trial.

MR. HENDRICKS: Or the defendant.

THE COURT: Let's pass by the Bohans for a moment. I will permit you to make a proffer in camera on that.

Now, Paul DeGagne, D-e-G-a-g-n-e. He was a court reporter, and he had transcribed the proceedings in the case of United States against Gordon, a trial over which Judge Claiborne had conducted and made certain comments with respect to the sentencing.

I had ruled in the first trial that it was inadmissible. You had him here available, did you? It says at the second trial, not applicable. So do we have anything involved in the second trial?

MR. HENDRICKS: What happened there was, as follows, Your Honor. We were, of course, aware of the Court's ruling in the first trial. We sought to convince the Court to change, frankly to change its ruling in the second trial, because we thought, just prior to the second trial that Mr. DeGagne's testimony on the transcript reflecting the proceedings in the Gordon case and the testimony of an Agent Olsen were properly admissible.

So what you really had was two witnesses, not one. You had Agent Olsen and Mr. DeGagne. What the Court did, if I recall correctly, we put on Mr. Olsen outside the presence of the jury and took a proffer from the testimony of Mr. Olsen, which was a conversation he had had with Judge Claiborne in the courthouse in Las Vegas in which Judge Claiborne made a statement very similar to the one which was reflected in the sentencing transcript.

His statement related to the reasons why he, Judge Claiborne, had determined the guilt of the defendant in that case. The Court determined after listening to Mr. Olsen's testimony that the gist of Judge Claiborne's ruling in the case did not go to the cashing of checks but to the existence of a marker or a debt at a casino.

Consequently, the Court, Your Honor, decided that the testimony should not be admitted. As soon as we learned that Mr. Olsen's testimony would not be admitted, we assumed a fortiori, that Mr. DeGagne's presence would not be any longer required, and of course we dismissed him.

THE COURT: So you had no expense bringing him here, I take it.

MR. HENDRICKS: He was here, he was here. We anticipated putting them on, Olsen and DeGagne, together. So I guess the --

THE COURT: You have the initials N.A., which I read as not applicable, for his expenses at the second trial. First trial he was here, of course, and testified in the absence of the jury, I believe.

MR. HENDRICKS: Well, the first trial, I think the N.A., if Your Honor is addressing -- the N.A. means "no information available," not "not applicable".

THE COURT: You mean his expenses at the first trial were not presented to the marshal here?

MR. HENDRICKS: That's correct. We could not get that information. We relied only on information we could document.

THE COURT: Well, can you --

MR. HENDRICKS: We did not use it as part of our calculation.

THE COURT: He didn't present any expenses for the second trial.

MR. HENDRICKS: Well, there is simply the routine matter of the cost of the service of the subpoena that's reflected on page four.

THE COURT: Well, that's two dollars, isn't it?

MR. HENDRICKS: That's correct. And whatever costs were associated with his appearing in the second trial.

Our position is this, Your Honor: that we brought him here in good faith, in anticipation of or in hopes of convincing the Court to admit the evidence. When the Court ruled after hearing Mr. Olsen's proffered testimony that the transaction would not be admissible, we discharged him.

THE COURT: Nobody knows whether Mr. DeGagne came here at the expense of the Government or came on his own personal expense for either of these trials, do we?

MR. HENDRICKS: That's correct. With the exception of the service fee, we do not have the information.

THE COURT: All right, all right. Service fee involves an item of two dollars.

MR. HENDRICKS: Correct.

THE COURT: Well, now, how about Russell Olsen?

MR. HENDRICKS: Russell Olsen we make no -- I don't believe we have included him in this list. No, we have not made any claim for his appearance. I do not believe he appeared under subpoena.

THE COURT: All right. So we don't have any problem as to the expenses relative to Russell Olsen and Paul DeGagne.
Who is Ronald Faiss, F-a-i-s-s?

MR. HENDRICKS: Mr. Faiss, Your Honor, is a custodian from the Horseshoe Casino in Las Vegas. He is either the comptroller or occupies a similar position in the financial management part of the casino operation there.
He was a witness in the first trial. We subpoenaed him in the second trial principally for the purposes of identifying a casino stamp on the back of checks, income checks, which checks were cashed at the Horseshoe.
So we subpoenaed Mr. Faiss and he was present. Prior to his testimony, another witness named Anita Praytor, who was a custodian from the Valley Bank, identified the stamp, and she identified the stamp as a stamp reflecting that the check had been cashed at the Horseshoe Casino.
It is our belief that that question, although not patently improper, was a question to which an appropriate objection might have been raised. It was not raised. And since --

THE COURT: The check was in evidence, was it not?

MR. HENDRICKS: Yes, it was. I don't believe it was in evidence, Your Honor, until the testimony of Anita Praytor. She was the custodian for the bank.

THE COURT: I don't remember whether the endorsement on the back was so vague or indistinct that it needed any further testimony.

MR. HENDRICKS: Well, I don't believe it was clear from the endorsement, necessarily clear, Your Honor, that the stamp of the casino indicated or meant that the check had been cashed at the casino, as distinguished from some other means of handling there. She did testify that's what it meant. She knew that's what it meant.

THE COURT: Is this one of the items you offered to stipulate with defense counsel?

MR. HENDRICKS: I believe so, yes, sir. So as soon as Anita Praytor had identified the stamp as meaning the check had been cashed, we told Mr. Faiss his testimony would no longer be required, because that's the only reason he had been subpoenaed.

We didn't realize that until right after, of course, Anita Pretore's testimony. Mr. Faiss would have testified immediately thereafter. He's from Las Vegas.

THE COURT: All right. The next is Richard Kilmartin. I don't know him, but he was not here for the second trial at all. You have no expenses for him?

MR. HENDRICKS: That's correct.

THE COURT: And the first trial has been eliminated. We don't have any necessity of discussing him, do we?

MR. HENDRICKS: With respect to Peggy Kotecki.

THE COURT: How about Kilmartin, are you agreed that there's nothing chargeable against him, not even the service fee?

MR. HENDRICKS: That's correct.

THE COURT: Peggy, she did testify, if I recall, at the second trial.

MR. HENDRICKS: Yes, sir, she did testify.

THE COURT: She did not testify at the first trial. Since we have eliminated the first trial expenses, there are $376 expense for the second trial, which I assume is allowable.

MR. HENDRICKS: That is our contention, yes, sir. She testified as a rebuttal witness for the Government.

THE COURT: I take it she was served also?

MR. HENDRICKS: Yes, sir.

THE COURT: All right. Now, the next one we have is Genevieve McElwain. She testified at the first trial at the instance of the Government, did she?

MR. HENDRICKS: Yes, she did, Your Honor.

THE COURT: And at the second trial she testified at the instance of the defendant.

MR. HENDRICKS: Yes, she was served with a subpoena, but she was not present, to my recollection, in Reno. We did not call her and notify her that her testimony would be required. In fact, we told her that her testimony would not be required.

So our position with respect to Miss McElwain was that we subpoenaed her. At the time of the subpoena we anticipated putting her testimony on in a fashion similar to the testimony she had given in the first trial, and after additional consideration, and after the subpoena had been issued, we decided not to use her.

THE COURT: The only thing you have involved is the service fee.

MR. HENDRICKS: That's correct.

THE COURT: We have passed on Mr. Russell Olsen. Who is Norman Powell?

MR. HENDRICKS: Your Honor, Mr. Powell is, or at least was a few months ago, the comptroller of the Golden Nugget Casino in Las Vegas.

In the first trial, Mr. Powell's testimony is exactly the same as Mr. Faiss's. He testified to the stamp on the back of certain Golden Nugget checks which were negotiated at the Golden Nugget Casino by Judge Claiborne. We subpoenaed him, and he did appear here in Reno and was ready to testify to the meaning of the Golden Nugget stamps on checks which were involved in the 1979 and 1980 tax years.

However, the same thing happened. Before he testified, we determined that similar testimony could be adduced from another witness, who we had already planned on having testify. So we got the testimony from someone else.

Mr. Powell's testimony was therefore not necessary, and we discharged him.

THE COURT: All right. Now, Annette Quintana did testify at the first trial, which is eliminated. She also testified at the second trial at the instance of the Government.

She was excused and then apparently brought back here and testified later. I don't recall the nature of her so-called rebuttal testimony. Can you enlighten me?

MR. HENDRICKS: Your Honor, I believe she was subpoenaed as a rebuttal witness. If you will recall, there was a rather hectic morning. We decided during the course -

THE COURT: That's not the only day that was hectic.

MR. HENDRICKS: That's true, Your Honor. There were a number of them. We decided after she was subpoenaed not to use her as a rebuttal witness. However, she was available out in the hall. I believe counsel for the defense had occasion to see her and discuss her as a possible witness on behalf of the defense.

She was then brought in at that time and that's where the testimony regarding her conversation with Mr. Wright came up as to these other checks. That was adduced.

THE COURT: That was her tax return.

MR. HENDRICKS: That's correct, there was a conversation outside the presence of the jury --

THE COURT: You brought her back, however, and decided not to use her.

MR. HENDRICKS: That's correct.

THE COURT: Well, do you think that the Government should be reimbursed for expenses for a witness who was here, testified, permitted to leave and then brought back and -- for what purpose, I don't know, by the Government. She was finally used by the defendant.

MR. HENDRICKS: Our position on that is, yes. Now, obviously the position is not as strong as the case where the person comes in and testifies to an important fact, but I think what the Court should focus on is at the time the expense was incurred, was it incurred in good faith?

The answer to that is yes, I think. In order for the Court to make a full determination in that regard, you have to hear a proffer as to what her testimony would be.

THE COURT: Clearly you are entitled to your $375.75, assuming that that's what you reimbursed her for her first trip up here during the second trial.

MR. HENDRICKS: Yes, sir. That was the --

THE COURT: And the service fee, but I still don't know why you decided you had to bring her back. I mean, it wasn't to give her the luxury of a free trip or anything, I'm sure.

MR. HENDRICKS: No, it was not. The purpose was to rebut evidence which had been adduced during the course of the defense case. My recollection is that we at that time felt that there was a need for some additional testimony regarding the question of the -- yes, the agreement to purchase Judge Claiborne's law practice.

There was some testimony regarding the extent of the contacts and conversation Judge Claiborne had had prior to his ascension to the bench regarding the sale of his lawfirm. The importance of that was that it was later used to suggest the reasonableness of the judge's reliance upon Mr. Watson.

THE COURT: I don't recall in the second trial anything that occurred along that line. In the first trial we had John Manzioni. He testified. We had Annette Quintana, and so on, but I don't recall anything that came up other than the fact that Judge Claiborne had allegedly discussed with what I designate as perhaps a tax preparer in the person of Mr. Watson.

MR. HENDRICKS: My recollection is, Your Honor, that Mr. Watson during the course of his testimony as a defense witness talked about discussions with Judge Claiborne he had prior to the preparation of the 1980 tax return.

I believe his testimony was to the effect that Judge Claiborne had related to him the attempts that he had made to sell the lawfirm. He related to him what he thought the value of the lawfirm was, based upon his discussions with what people said they might pay.

I believe that there was testimony to the effect that the judge had spoken with Annette Quintana, either Annette Quintana and/or James Brown, and a mention was made of a figure.

THE COURT: Wait a minute, I believe you may be correct along that line.

MR. HENDRICKS: We sought to put on Miss Quintana's testimony for purposes of establishing that no such agreement regarding the purchase of the firm --

THE COURT: Why did you not put her on then?

MR. HENDRICKS: Frankly, Your Honor, we considered Miss Quintana to be a person who was, I would say, highly sympathetic towards Judge Claiborne because of her long association with the judge.

THE COURT: You knew that before you ever asked her to come back.

MR. HENDRICKS: That is correct. We sensed during the course of her prior appearance here a heightening of a possible, a sense of increased antagonism during the course of the questions, and we frankly did not feel safe with her stability under those circumstances and we weighed her attitude and demeanor against the probative value. Even though we thought that the testimony would certainly be relevant and admissible, we decided against her use.

THE COURT: All right. Now, who is Leonard Speckin, S-p-e-c-k-i-n? Well, the second trial, all of his expenses are on the first trial.

MR. HENDRICKS: Yes, sir. We do not contest Mr. Speckin.

THE COURT: All right. Does that cover all of the witnesses who were subpoenaed but did not testify?

MR. HENDRICKS: No, sir, not completely.

THE COURT: I beg your pardon, here it is.

MR. HENDRICKS: Just for the record, there is --

THE COURT: Who is Gregory Stewart, S-t-e-w-a-r-t?

MR. HENDRICKS: Your Honor, Mr. Stewart is an accountant from Eugene, I believe, Oregon. He testified as an expert witness in the first trial regarding the propriety of including legal fee income in Schedule D computations.

Now, we subpoenaed Mr. Stewart to appear as an expert witness in the second trial to testify more or less to the same, along the same lines. However, after Mr. Stewart had appeared here and after Judge Claiborne had testified, it became very clear that the defense did not contend that the Schedule D computation was a proper inclusion of the legal fee income.

Consequently, it became finally clear after Judge Claiborne's testimony that Mr. Stewart's testimony would not be necessary, in that there was nothing to rebut in that regard.

THE COURT: Had I not at the first trial instructed the jury that Mr. Watson's so-called method of inclusion of legal fee income for capital gains purposes wasn't worth the paper it was written on? Didn't I say --

MR. HENDRICKS: Not in those words, Your Honor, but to that effect, yes.

THE COURT: Was there any reason to believe that I would change my mind?

MR. HENDRICKS: No, sir, but Your Honor also admitted Mr. Stewart's testimony in the first trial.

THE COURT: Yes, I did.

MR. HENDRICKS: There was no reason to believe Your Honor wouldn't admit it in the second trial.

The point we are making there, we subpoenaed him in anticipation of a situation similar to the first trial. It became clear as the testimony went on that the facts were, the contentions as to the Schedule D were simply not in the same position they had been in the first trial. We saw no reason to put on the testimony.

THE COURT: Charlotte Travaglio, T-r-a-v-a-g-l-i-o. She did not appear at the second trial. We don't have to consider her at all.

MR. HENDRICKS: That's correct. Miss Travaglio was the tax preparer that worked for Mr. Watson. We learned after her subpoena that an additional operation was necessary to address a malignancy problem that she has, and she was not available because of that illness.

THE COURT: Now, you claim for Connie Wright $460 for her initial testimony, and then you apparently recalled her.

As to Joseph Wright, you claim $468.97, but you don't -- Do you claim anything for recalling him?

I beg your pardon, you do claim that in there under a different section there. On page eight you claim for Joseph Wright $497 for his coming here for his initial testimony. He then was permitted to return to Las Vegas, I assume, and was later recalled as a rebuttal witness at an expense of $468.97.

MR. HENDRICKS: Yes, sir.

THE COURT: Now, I remember the nature of the rebuttal of Joseph Wright and that was dealt with, his so-called log, I believe, the daily log that he kept. Isn't that true?

MR. HENDRICKS: Yes, sir, it is.

THE COURT: And what did Connie Wright have to say on rebuttal?

MR. HENDRICKS: She did not testify

THE COURT: Why was she brought back here? To take care of Joseph?

MR. HENDRICKS: No, sir. Mrs. Wright, if you recall, she also testified as a Government witness during its direct case.

THE COURT: That's all right.

MR. HENDRICKS: Joseph Wright, there were two really issues that by the end of the trial were being addressed. One was the substantive treatment of tax information provided to Mr. Wright by Judge Claiborne, and another issue was the maintenance and the integrity of the files maintained in the offices of Mr. and Mrs. Wright.

THE COURT: Do you claim two items of $460 for Connie Wright, or do you claim -- you have one item of $460. That's when she appeared initially to testify.

MR. HENDRICKS: Yes.

THE COURT: And that's all right. Now you have another item of $450, bringing her back here for rebuttal purposes after she had initially testified.

MR. HENDRICKS: Yes, sir.

THE COURT: What I want to know, if she didn't testify when she came back the second time, why allow that expense?

MR. HENDRICKS: Because the subpoena was issued in good faith and because at the time the subpoena was issued and the costs were incurred, there was a reasonable basis for issuing the subpoena. That basis was as follows.

During the defense case, Judy Ahlstrom, Judge Claiborne's secretary, testified that she had delivered Defense Exhibit 1 to Joseph Wright's office in April of 1980 and that she had delivered it, I believe by the end of Miss Ahlstrom's testimony it became clear that her contention was she had delivered it to Mrs. Wright.

Mrs. Wright was subpoenaed in order to rebut. If she had testified, she would have rebutted the testimony of Judy Ahlstrom in that regard.

However, because of subjective considerations regarding Mrs. Wright's state of mind and our general attitude as to the effectiveness of the testimony at that time on that day, we decided against her use.

THE COURT: Well, what is the difference between making up your mind after she's here and making up your mind before you subpoenaed here?

MR. HENDRICKS: Well, aside from the $450, as Mr. Goodman points out, the difference is, if at the time we issued the subpoena, all we can do is represent to the Court that at the time we issued the subpoena, we anticipated a high likelihood of using her.

THE COURT: I don't blame you for issuing the subpoena perhaps, but what you want to do now, you are passing on to Judge Claiborne this expense.

MR. HENDRICKS: That's correct.

THE COURT: He said money never meant anything to him, but I don't believe he's quite that serious when he's talking about my assessing the costs.

THE DEFENDANT: Only when you run out, Your Honor.

THE COURT: That's what bothers me about it.

That completes your argument, does it, on the various items?

MR. HENDRICKS: Just so the record will be complete, Your Honor, I think the only person that has not been mentioned who is mentioned on page four is Mr. Watson.

THE COURT: Mr. Watson. Do we have something on him?

MR. HENDRICKS: Yes, sir. He was subpoenaed by the Government at both trials. He did not testify for the Government.

Now, the only reason I bring this up, Your Honor, is so the record will be complete, not because we have an inordinate interest in the $3.20 charge. The point there was that Mr. Watson --

THE COURT: You didn't pay his expenses. You just subpoenaed him; is that correct?

MR. HENDRICKS: We subpoenaed him. He appeared as --

THE COURT: I am sure he would have collected both from Judge Claiborne and the Government, if he could have.

MR. SHAW: He will just write it off.

THE COURT: We don't have any indication here that Mr. Watson was paid any expenses.

MR. HENDRICKS: No, sir. We don't claim any. I just wanted to point out that his appearance on the list on page four is attributable to the fact that we subpoenaed him and we would have used him as a rebuttal witness.

The reason we didn't use him as a rebuttal witness is because the defense used him as a defense witness.

I think that completes the record with respect to these items that the Court wanted addressed in its order.

THE COURT: All right. Does that complete the presentation by the Government? Let's take then the views of defense counsel as to the comments as to what I have done thus far and their comments particularly with respect to the matters that Mr. Hendricks addressed.

MR. GOODMAN: Your Honor, now that we have filed a Notice of Appeal, there will be additional matters as far as the preparation of transcript.

THE COURT: I wanted to cover that, if you would be good enough to specify exactly what you want now. The only thing I can think of is your jury voir dire for the second trial and of course you may want the argument from yesterday. I don't know that you do, but that's optional with you.

And the sentencing proceedings today. That's optional with you. There is a hearing that never has been ordered transcribed, on February 21st, 1984. I don't even remember now what occurred at that hearing, it's been so long ago. I know that's never been written up. If you and Mr. Shaw and Mr. Hendricks get up before that Court of Appeals and say something happened or didn't happen on February 21st, I am just warning you, they don't have any transcript of it.

MR. GOODMAN: I understand that. It would be our present intention to order all of the transcripts of all of the proceedings, those including the proceedings which have been enumerated by the Court.

THE COURT: That's February 21st, 1984, if you will make a note of this. I don't know who took it, but one of your firm took it from Capitol Reporters. And you wish yesterday's proceedings written up?

MR. GOODMAN: Yes, Your Honor. Today's proceedings.

THE COURT: Which would be October 2nd, and October 3rd.

MR. GOODMAN: In addition, we would want the jury selection process.

THE COURT: And the jury selection process for the second trial.

MR. GOODMAN: That is correct.

THE COURT: Do you want, Mr. Goodman, the first day I came here was on a Monday -- rather I came on a Sunday and Monday we devoted the entire time to granting excuses. And the court reporter was present. There were no objections on either side on that. I take it you don't want that, do you?

MR. GOODMAN: I see no reason to order that.

THE COURT: The jury selection process would start on a Tuesday of the week of the trial, and carried on into early Wednesday morning, about an hour or hour and a half Wednesday morning.

MR. GOODMAN: We will need the opening statements.

THE COURT: You want the opening statements?

MR. GOODMAN: Yes.

THE COURT: All right. And you want the closing argument?

MR. GOODMAN: We need closing arguments as well.

THE COURT: I hope you are successful in getting the Court of Appeals to read those.

MR. GOODMAN: If I cite them --

THE COURT: I have never read one in my life.

MR. GOODMAN: It depends if there's an issue created, if we cite them to it. The reason I bring that up at this point in time, Your Honor, I would like to take the Court up on it's suggestion and your proposed order of yesterday where I can try to segregate by way of pagination the breakdown as far as the costs are concerned.

I may find that I am better off with the two-sevenths formula, but I would like to at least have the opportunity of trying to break it down on a percentage basis based on the number of pages in the transcript.

THE COURT: I can see the logic of your basis, but we are talking about a relatively small amount under any circumstances, whichever way you go. Of course, I realize it would be impossible for me to suggest to you that you might get together with your adversaries on this and resolve that momentous question. Rather than go page-by-page and page-by-page, but --

MR. GOODMAN: We are going to have to do that anyway.

THE COURT: How much time do you want me to hold off my entry of this order? You noticed your appeal. This is a collateral matter.

MR. GOCDMAN: Yes.

THE COURT: The statute says, together with the costs of the prosecution and that's a part, I suppose, of the sentence, but it is purely a collateral matter. How much time do you want to make your determination as to either the page-by-page analysis or the count-by-count analysis?

MR. GOODMAN: We can certainly go by a random sampling. We will start working on the appeal. We already started to think about the paging through the transcripts. I can run a random sampling and then I can make the determination as to which way we want to go. I can advise the Court telephonically, I would say by the end of this weekend.

THE COURT: You understand that some of these matters I suppose you are now ordering from the court reporter would be wholly borne by the defendant, except for the February 21st, 1984, hearing, which would be prior to the first trial.

MR. GOODMAN: It was not my understanding. Please correct me if I'm wrong, if in fact the Government is going to order a transcript for the appeal purposes, that the defendant pays for that as well? That's not my understanding.

THE COURT: Of course, the convicted defendant generally assumes the costs of providing the original transcript.

MR. GOODMAN: That's correct. Of course, we need a copy for ourselves.

THE COURT: You would order a copy and of course the Government has the right to order the copy at their expense on that line.

MR. GOODMAN: We share an understanding on that.

THE COURT: You get to the later proceedings. Are these properly considered a cost on the part of the prosecution?

MR. GOODMAN: I would suggest to the Court, I don't know the answer. I can't cite the Court to the case, but I would suggest it's part of the appellate situation rather than a trial cost situation which the statute appears to address.

THE COURT: The hearing of February 21, 1984, would be guided by the same principles as the hearing of January 8, 9 and 10 of 1984, I believe the dates were.

MR. GOODMAN: Yes. We would agree with that.

THE COURT: But when we come to October 2nd and

October 3rd, the jury selection process, the opening statements and closing arguments, why, those are matters that you are electing to have. If the Government wants to order a copy for their own purposes, is that a cost to the prosecution? There are authorities to the effect that the copy is a part of the cost of the prosecution.

MR. GOODMAN: For the appellate purpose?

THE COURT: Yes. It is necessary in connection with the trial or the appellate proceedings.

MR. GOODMAN: We need them. If that's going to be the case, we have no alternative. We do need the entire transcript, as I have suggested to the reporter.

THE COURT: I don't need it. I have already passed sentence. I don't need anything more, as far as I am concerned.

MR. GOODMAN: I understand.

THE COURT: All right, let's take up the allocation. I take it you have no disagreement with my first ruling to the effect that the costs of the first trial are not chargeable to Judge Claiborne.

MR. GOODMAN: No disagreement with that.

THE COURT: How about the costs of the transcripts for the first and second trials other than the fact that you may wish to reserve your right to consider whether it should be on a page-by-page analysis or a count-by-count analysis or some agreement with the Government?

MR. GOODMAN: We have no problem with that.

THE COURT: Now, the sum of $100 payable to the United States marshal. I assume you want to take exception to that.

MR. GOODMAN: That is correct.

THE COURT: But you have no authority to the contrary, I take it.

MR. GOODMAN: We cited the Gleckman case.

THE COURT: The Gleckman case, which I have cited in my order. I take it you want to take an exception to my enlarging the statute which provides for a two dollar fee for the marshal for making service of a subpoena and attaching to that the right of the Government to obtain reimbursement when the service of the subpoena is made by the FBI or IRS.

MR. GOODMAN: We would except to that.

THE COURT: That's one of the most interesting questions that have been presented to me during the entire trial.

MR. GOODMAN: That was a two dollar question, Your Honor.

THE COURT: I take it as to the docket fee, you can't take exception to that, would you?

MR. GOODMAN: We agree with that.

THE COURT: As to the witnesses who testified, what do you propose, if anything, to do about the computation of the expenses? You say you call for strict proof and the Government has said they got their figures from the United States marshal vouchers that were apparently submitted and approved.

MR. GOODMAN: I would inquire through the Court whether or not they would make those available for us for our inspection, if in fact the addition -- that's all we are really questioning -- is appropriate.

THE COURT: As a matter of fact, I think you have the perfect right to look at them, if you care to. I don't know where the marshals got them. Would they be available in Reno?

MR. HENDRICKS: I have them, Your Honor.

THE COURT: You have? You have no objection to counsel reviewing them, I take it.

MR. HENDRICKS: I have no objection to them reviewing them, no.

THE COURT: Yes. All right. Now, what is your view, Mr. Goodman, as to the expenses of Judge Decker and Annette Hensley or Judge Decker or Annette Hensley.

MR. GOODMAN: It is our position that Annette Hensley was the custodian of the record which was at issue here, as far as the financial disclosure form. It is our position that the only materiality of the form was to use it as an admission, in effect, by Judge Claiborne which would have some probative weight as far as the preparation of his tax return for that particular year.

Judge Decker's testimony, of course, went to Count VII and he collaterally may have testified as to the materiality of the form, but for purpose of the prosecution as it finally ended up on the convictions on Counts V and VI, we would submit that only Miss Hensley's testimony was necessary and material, and that Judge Claiborne should not be assessed costs for Judge Decker.

THE COURT: All right. What is your position on the cost of the charts?

MR. GOODMAN: On the costs of the charts, we cite the Court to the case we believe is most applicable. That's the Ninth Circuit case.

THE COURT: Shakey's?

MR. GOODMAN: Yes. What they should have done, assuming they wanted to be reimbursed for costs of the charts, they should have come to the Court and sought permission, but it is our position that had they done that in advance, the Court would have taken the position that the Court asked rhetorically in its order, and that is if we were trying the case just in front of the Court without a jury, would the charts have been, using the language of Shakey's, essential.

I would submit that they were not essential. Besides the pretty colors, the same presentation could have been made by Mr. Hendricks going to the butcherboard paper on the easel there and making the same breakdown, which would have cost about five cents instead of $3,000.

THE COURT: I don't necessarily agree that the Shakey's case would be applicable to a criminal case, as I have indicated in my order, but I take it that you generally agree with my conclusions that I have reached on the charts.

MR. GOODMAN: Yes.

THE COURT: As stated in the order.

MR. GOODMAN: That is correct.

THE COURT: Now let's take these witnesses. Do you know anything about Bonnie Bohan?

MR. GOODMAN: Yes, I have a good idea where they were going to go with Mrs. Bohan and I believe the same would apply to Daniel Bohan. If the Court were to have an in camera discussion, I think that would be easily resolved.

THE COURT: I am not going to let you consider the expenses with respect to Russell Olsen and Paul DeGagne. I will disallow those.

MR. GOODMAN: All right.

THE COURT: What do you have to say about Ronald Faiss?

MR. GOODMAN: The same argument. Same argument for Mr. Faiss and Mr. Powell. Both of them were custodians. The Court asked the question whether or not there had been an offer to stipulate as to the -- I guess the stipulation would have been that the stamp on the back of the various checks purported to indicate that the check was negotiated at either the Horseshoe as it would pertain to Mr. Faiss, or the Golden Nugget as it would pertain to Mr. Powell.

It is our recollection, I asked Mr. Raggio, who is really the one who was discussing potential stipulations. That in fact was not a subject of stipulation.

THE COURT: Well, I don't remember now of course, but I think it would be crucial to the Government. The Government of course must prove in some manner or another how the check was cashed and they couldn't use the defendant at that stage of the proceedings; couldn't call him as a witness.

MR. GOODMAN: I understand, but the checks were in fact in evidence. They were --

THE COURT: The checks were in evidence.

MR. GOODMAN: They were admitted through a bank custodian. The bank custodian certainly was capable of saying that it is the customer of the bank who negotiates the checks.

THE COURT: That's ultimately what was done. That's why Ronald Faiss and Norman Powell were not called as witnesses, but the difficulty is that we don't know what the lady -- She did identify them, and there was no objection.

Probably if an objection had been registered, it would have been overruled in any event, because the document, I don't know that it was actually in evidence at that time, the check in question or the checks, but I take it you do object to any allowance of expenses for Ronald Faiss and Norman Powell.

MR. GOODMAN: Yes.

THE COURT: Now, what do you have to say about Peggy Kotecki?

MR. GOODMAN: It is our position that --

THE COURT: She testified.

MR. GOODMAN: She testified, but the purpose of her testimony, I think, was to attempt to impeach Judge Claiborne's testimony to the effect that he had dealt with a woman by the name of Peggy at a particular occasion when he went to Mr. Watson's office.

Of course, by the time Peggy Kotecki was called, a substantial period of time had passed, as I recall it, from Judge Claiborne's testimony where he recanted in effect and indicated that in fact that was not the woman; that he was mistaken; that he didn't deal with somebody by the name of Peggy.

So I would submit --

THE COURT: It was necessary to bring her here, was it not, to establish that she was not the woman, after he had testified that it was somebody by the name of Peggy.

MR. GOODMAN: He had recanted or rethought it and expressed to the jury that it was not somebody by the name of Peggy. Then they brought Peggy in solely to show some type of nefarious thought process on the part of the judge.

THE COURT: Now, as to Genevieve McElwain, the only issue we have there is a service fee. You want to make any comment about that?

MR. GOODMAN: That's a two dollar service fee?

THE COURT: It may be three dollars or something like that.

MR. GOODMAN: I will pay for that, Your Honor.

THE COURT: What?

MR. GOODMAN: I will pay for that.

THE COURT: You will pay for that. No disagreement. We will allow that.

And as to Annette Quintana, she of course did testify when she came up the first time and her expenses there were $375.75.

MR. GOODMAN: We cannot take issue with that first testimony. But as to calling her back --

THE COURT: I think you're right.

MR. GOODMAN: Okay.

THE COURT: I disallow the second trip of $378.15. I am going to allow the first trip of $375.75.

How about the testimony of Gregory Stewart, the gentleman from Oregon who came down here as an expert?

MR. GOODMAN: I would suggest that even though -- first of all, during the first trial there was never a contention on the part of Judge Claiborne that the Schedule D was done in accordance with acceptable accounting principles. Watson, who was a Government witness during the first trial, of course tried to justify his treatment.

THE COURT: Even when he came here in the second trial, he is still of the same opinion.

MR. GOODMAN: No one is going to change that.

THE COURT: Nothing is going to change him.

MR. GOODMAN: I think the crucial reason why Mr. Stewart should be disallowed in the second trial is that in our opening statement we advised the jury -- Of course, that's not evidence but it certainly has some notice effect upon the Government in subpoenaing witnesses. We advised the jury, I think the phrase I used was it was an abomination as far as the Schedule D and they were put on notice then that we did not intend to justify Watson's actions.

THE COURT: I do remember in the opening statement you said very definitely to the second trial jury that you couldn't do anything but condemn Mr. Watson's tax return that he had prepared for Judge Claiborne.

MR. GOODMAN: That is correct.

THE COURT: All right. Now, what have you to say about Connie Wright? Well, I am going to allow her the $460 expenses, plus service fee for her first appearance, and I will disallow her second appearance of $450. I see no reason why she should have come, except to accompany her husband. Do you raise any issue as to both trips that Joseph Wright incurred?

MR. GOODMAN: We would take the position that as to the second trip of Joseph Wright, it was really on the same basis that the Government tried to bring in Peggy Kotecki, that they were trying to evince some type of wrongdoing on the part of Judge Claiborne because he had a discussion with Mr. Wright on a Monday morning which the Government tried to create an inference that Judge Claiborne was attempting to somehow fashion his own testimony based on whether or not Mr. Wright would come back.

I believe that was improper. It was one of the -- we objected strenuously to it. It was one of the points that we raised in our motion for new trial and on that basis we would object to his being called back in rebuttal.

THE COURT: I think it was necessary to bring him back on the two occasions in question, especially after the log had been discovered. I will allow Joseph Wright's expenses for both occasions of his visit during the second trial. The only thing claimed as to Watson is a service fee, which amounted to $3.20. Do you want to comment about that?

MR. GOODMAN: No, I don't.

THE COURT: All right. I will allow that service fee. Do you have any other comments you would like to make, Mr. Goodman? I think I covered the entire matter.

MR. GOODMAN: No, I don't, as to the costs. Thank you.

THE COURT: All right, gentlemen, I will let you know in a day or two about the few remaining items that I have not concluded on. That will terminate the matter and give you a summarization of what the total cost shall be.

MR. GOODMAN: Can I have until Friday to call you and advise you whether or not we are going to accept the two-sevenths or work something out with the Government?

THE COURT: With respect to the rule as to the so-called conference call requirement, requirement of a conference call, is there any necessity for that any longer? You still want it, gentlemen?

MR. GOODMAN: I don't think it's necessary to this matter.

MR. SHAW: No, Your Honor.

THE COURT: All right. You are at liberty, if necessary, to contact me about any matter that you may wish to contact me.

MR. SHAW: Your Honor, for purposes of the record, there is some concern that I have about the jurisdictional question after the defendant has filed his Notice of Appeal. I assume that by this arrangement we have worked out, the defendant is waiving any objection, or agreeing not to make any objection based on lack of this Court's jurisdiction for the remainder of this week.

THE COURT: About the entry of an order subsequent to his filing a Notice of Appeal?

MR. SHAW: Yes.

THE COURT: Well, if it were an order affecting the defendant's liberty and so on, I think it would be material, but if the Court of Appeals can tell me how in the world a judge can decide these matters and include them in to the sentencing order, I would be glad to be enlightened.

When there's no agreement, the judge has to hear about the matter. The time to hear it is not until after the sentence has been imposed. But it may be necessary, the Government may wish to file some cross appeal on the important matter of these costs.

You all took one up on me one time. You didn't, but involving a $15 filing fee. You got it reversed. So you prevailed, but the important questions involving two dollars and a half and so on may create some interest up there.

How do you want to handle it, gentlemen? Would it be agreeable? It's a collateral matter. The Notice of Appeal has been filed. Could it be understood that if either party wishes to take any exception to the Court's ruling on the costs of prosecution, that you would file a Notice of Appeal limited to that alone?

MR. GOODMAN: Yes.

THE COURT: Would that be satisfactory with the defendant?

MR. GOODMAN: Yes.

MR. SHAW: Yes, sir.

THE COURT: And the Government, all right. Gentlemen, then if there's nothing -- Oh, are we going to take up the Bohan matter? Are we going to take that up? Does the Government want to waive their --

MR. HENDRICKS: We don't want to waive it.

THE COURT: Let's take it up in chambers.

(The following proceedings were had in chambers.)

THE COURT: All right, gentlemen, how about Mr. and Mrs. Bohan?

MR. GOODMAN: I have a pretty good idea as to who they are. I will advise the Court that my information is that they were persons who apparently had made police reports that their home had a bug, an electronic surveillance device in the kitchen area and that they attributed it to Judge Claiborne, having it placed in there by a private detective who I represented at one point in time, Eddie LaRue.

I don't see how -- I mean, assuming all that were relevant, I don't see how testimony along that line could be in the nature of character evidence which would refute a character trait of honesty and integrity or truth and veracity which are the only issues that Judge Claiborne could possibly raise if he put on character evidence.

Therefore, I don't think this Court would even consider letting those people testify along that line.

MR. HENDRICKS: I can help Mr. Goodman out. I don't believe he interviewed either of the Bohans. He is probably engaging in speculation there.

Miss Bohan was a 21 dealer in the mid-1970's, I believe about 1977, Your Honor, in Las Vegas. During the time that she was employed as a 21 deal, she was approached by Judge Claiborne and her testimony would be, in hopes, with the view of establishing a social relationship.

She declined and thereafter she noticed over a period of time that her home, including her bedroom, was bugged. Other investigation of this matter conducted by the FBI at or about the same time which included interviews of people who were employed by Eddie LaRue, interviews of people who overheard conversations between Eddie LaRue and Judge Claiborne, leads to the reasonable conclusion that Judge Claiborne hired Eddie LaRue.

Eddie LaRue's instructions were, or clearly Judge Claiborne knew that Eddie LaRue was hired to plant bugs in Bonnie Bohan's house, which planting of bugs and interceception, non-consentual interception of conversations constitute a Federal violation, and that Judge Claiborne was briefed by Eddie LaRue as to the contents of those so he could confront Bonnie Bohan, which he did, and in one conversation alluded to the fact that he had access to intimate details of her life and any additional efforts by her to resist his entreaties would be a futile exercise.

We believe that that kind of cross-examination question goes to the fundamental question of integrity and character.

THE COURT: Do I understand that, you use the term social relations. That means he may have asked her to go out with him, have a date, something like that?

MR. HENDRICKS: I believe in all fairness that the record reflects that the judge asked her to go out with him, the judge asked her to accompany him to Washington D.C. The judge gave her, sought to give her various gifts, including, I believe, a mink coat, which she rejected.

He sought to establish a social relationship which would have logically, I think, led to a very substantial relationship. It never got off the ground because Mrs. Bohan consistently rejected his overtures.

THE COURT: Well, maybe in the eyes of Mrs. Bohan. What is Mr. Bohan now?

MR. HENDRICKS: Mr. Bohan was a party to the discovery of various of these listening devices. There were a number of them. They are not the only people who would link this --

THE COURT: You have no direct evidence tying Judge Claiborne in to that?

MR. HENDRICKS: Oh, yes, we do, Your Honor. The Bohans -- the total proffer on this matter would also include the testimony or the statements of FBI Agent Jessinger who I think for purposes of this predicate, for purposes of determining the good faith of the Government in putting these questions to a defense character witness, it would say that X employees of Eddie LaRue, some of whom were arrested by Las Vegas police outside the home of the Bohans under circumstances which lead to the conclusion that they are in the process of planting or retrieving bugs, that those people, one or more of those people informed the FBI that they were aware, they were hired by Eddie LaRue to plant the bugs and that an individual reported to the FBI overhearing a conversation between Eddie LaRue and Judge Claiborne which can reasonably be construed as Eddie LaRue informing Judge Claiborne of the results of the bugs of the Bohans' home.

THE COURT: Well, you are now asking me to make an allowance for witnesses who want to testify to collateral matters that I have expressly kept out with Mr. Goodman, trying other cases and so on.

MR. HENDRICKS: Here is the way it would have come up, Your Honor. The defense puts on a character witness. We would simply ask the character witness for purposes of addressing the question of the fundamental question of his character for truthfulness and integrity, did you know that in about such and such a year, that Judge Claiborne, after being rejected by so and so, a particular person, Bonnie Bohan, caused her home to be bugged for purposes of intercepting intimate conversations between her and her husband, so that he could confront her with those conversations, something along those lines.

THE COURT: We would have been trying this case for nine weeks more if that had occurred. I will disallow those items of expense for the Bohans. That will end that one.

MR. HENDRICKS: We don't suggest, Your Honor, that we would have offered the Bohans as witnesses themselves. We simply had them here because we anticipated if this matter had come up, we knew it's a sensitive matter.

Mr. Goodman would have logically said, We demand a proper predicate to be established. We would have had them there for that purpose, not for purposes of testifying before the jury.

THE COURT: I understand. I would never have let it in, I don't believe, knowing what I know now.

All right, gentlemen. Thank you.

(The hearing concluded at 12:30 p.m.)

STATE OF NEVADA,)
) ss.
COUNTY OF WASHOE.)

I, KAREN WITEK, Certified Shorthand Reporter Number 195, do hereby certify that I was present on the 3rd day of October, 1984, at the hour of 9:30 o'clock a.m. thereof, in the United States District Court, District of Nevada, Reno, Nevada, and reported the proceedings in the within-entitled cause in stenotype notes, which were thereafter transcribed by me;

That the foregoing transcript, consisting of pages 102 through 185, contains a full, true and complete transcription of my said stenotype notes, and is a full, true and correct record of said proceedings had at said time and place.

DATED at Carson City, Nevada, this 28th day of November, 1984.

KAREN WITEK, RPR
Nevada CSR No. 195

UNITED STATES of America,
Plaintiff-Appellee,

v.

Harry Eugene CLAIBORNE,
Defendant-Appellant.

No. 84-1009.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 24, 1984.
Decided March 5, 1984.

Defendant, a federal judge, filed motion to quash indictment against him and to dismiss proceedings against him. The United States District Court for the District of Nevada, Walter E. Hoffman, Senior District Judge, denied motion, and defendant filed interlocutory appeal. The Court of Appeals held that: (1) Court of Appeals had jurisdiction to review defendant's noncertified interlocutory appeal from district court's dismissal of claim that sitting federal judge is immune from criminal prosecution prior to his removal from office by impeachment process; (2) Constitution does not immunize sitting federal judge from criminal prosecution prior to his removal from office by the impeachment process; (3) defendant was not entitled to pretrial evidentiary hearings to determine whether executive's prosecution was improperly motivated; and (4) because Court of Appeals determined that defendant's asserted "right not to be tried" claim lacked merit, trial court's continuation of pretrial hearings while interlocutory appeal was taken was harmless.

Order accordingly.

1. Criminal Law 🔑1023(3)

Court of Appeals had jurisdiction to review defendant judge's noncertified interlocutory appeal from district court's dismissal of claim that sitting federal judge is immune from criminal prosecution prior to his removal from office by impeachment process.

2. Criminal Law 🔑1023(3)

Under "collateral order" exception, interlocutory order is immediately appealable if it conclusively determines disputed question, resolves important issue completely separate from merits of action and is effectively unreviewable on appeal from final judgment.

3. Judges 🔑36

Federal judges, like state judges, enjoy absolute common-law immunity from civil liability for acts committed in their official capacity.

4. Judges 🔑11(4)

Federal judges are "civil officers" within meaning of section of Constitution providing that "all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors." U.S.C.A. Const. Art. 2, § 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Judges 🔑38

Constitution does not immunize sitting federal judge from criminal prosecution prior to his removal from office by the impeachment process. U.S.C.A. Const. Art. 1, § 3, cl. 7; Art. 3, § 1 et seq.

6. Criminal Law ⇐1023(3)

Vindictive or selective prosecution claim is not immediately appealable under "collateral order" exception.

7. Criminal Law ⇐632(5)

Judge under federal indictment was not entitled to pretrial evidentiary hearings to determine whether executive's prosecution was improperly motivated.

8. Criminal Law ⇐1083

Ordinarily, if defendant's interlocutory claim is considered immediately appealable, district court loses its power to proceed from time defendant files his notice of appeal until appeal is resolved.

9. Criminal Law ⇐1166(1)

Because Court of Appeals determined that defendant's asserted "right not to be tried" claim lacked merit, trial court's continuation of pretrial hearings while interlocutory appeal was taken was harmless.

Steven A. Shaw, William C. Hendricks, III, Jan Nielsen, Little, Christopher G. Caldwell, Dept. of Justice, Washington, D.C., for plaintiff-appellee.

William J. Raggio, John Squire Drendel, Reno, Nev., Oscar B. Goodman, Goodman, Terry, Stein & Quintana, Las Vegas, Nev., Terence J. Anderson, Robert S. Catz, School of Law, Univ. of Miami, Coral Gables, Fla., for defendant-appellant.

Appeal from the United States District Court for the District of Nevada.

Before GIBSON, GARTH and KENNEDY, Circuit Judges.*

PER CURIAM:

This interlocutory appeal raises anew the issue whether the United States Constitution immunizes a sitting federal judge from criminal prosecution prior to his removal from office by the impeachment process. Appellant, Harry Eugene Claiborne, is a United States Judge for the District of Nevada. He was appointed to the bench in August, 1978. On December 8, 1983, a seven count indictment was returned against Claiborne. Count I of the indictment alleged that Claiborne solicited and received $30,000.00 from Joseph Conforte, a Las Vegas brothel owner, in return for being influenced in the performance of official acts—i.e., decisions regarding motions in a pending case. (18 U.S.C. § 201(c)). Count II alleged that Claiborne caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte. (18 U.S.C. § 1343). The scheme to defraud allegedly involved Claiborne's accepting $55,000.00 from Conforte in return for promising to secure the reversal of Conforte's criminal tax evasion conviction by bribing one or more judges on the Ninth Circuit Court of Appeals.[1]

Claiborne's trial is scheduled to begin on March 12, 1984. On January 3, 1984, Claiborne filed *inter alia* a motion to quash the indictment and to dismiss the proceedings against him, claiming the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through the impeachment process. The district court judge[2] denied the motion by an amended order dated February 8, 1984. In that order, the trial court found

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* Sitting by designation: the Honorable Floyd R. Gibson of the Eighth Circuit; the Honorable Leonard I. Garth of the Third Circuit; and the Honorable Cornelia G. Kennedy of the Sixth Circuit.

[1] Count III of the indictment charges that Claiborne obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating Claiborne. (18 U.S.C. § 1503). Counts IV, V, and VI charge that Claiborne failed to report the bribes as income on his tax returns. (26 U.S.C. § 7206(1)). Count VII, unrelated to the other charges, alleged that Claiborne had knowingly failed to include an outstanding $75,000.00 loan on the financial disclosure form he filed with the Judicial Ethics Committee (18 U.S.C. § 1001).

[2] The Honorable Walter E. Hoffman of the Eastern District of Virginia, sitting by designation.

Claiborne's claim "frivolous" and stated that the case would proceed to trial as scheduled on March 12, 1984. The district court also indicated its intention to hear other pre-trial motions on February 21, 1984. Claiborne filed an interlocutory appeal of this order with the Ninth Circuit Court of Appeals. Characterizing the district court's order as "a final collateral order", Claiborne claims this interlocutory appeal vested exclusive jurisdiction in this court pursuant to 28 U.S.C. § 1291 and divested the district court of jurisdiction to proceed. Claiborne also filed an application for writ of prohibition and mandamus, seeking to stay the trial court from proceeding until this court resolved the merits of his interlocutory appeal. By an order dated February 16, 1984, we declined to stay the district court's proceedings of February 21, 1984, without prejudice. Claiborne renewed his motion for a stay on February 17, 1984.

I. *Appealability*

[1] Claiborne's motion to dismiss was based upon the separation of powers principle of the Constitution and specific constitutional provisions which purportedly immunize a federal judge from criminal prosecution until he is removed from office by the impeachment process. As the parties agree, we have jurisdiction to review Claiborne's noncertified interlocutory appeal from the district court's dismissal of this claim.

[2] Although 28 U.S.C. § 1291 limits appellate court's jurisdiction to "final decisions of the district courts", the Supreme Court has permitted departures from this rule where an interlocutory order falls into the "collateral order" exception announced in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 545–47, 69 S.Ct. 1221, 1225–26, 93 L.Ed. 1528 (1949). Under that exception, an interlocutory order is immediately appealable if it "conclusively determines the disputed question, resolve[s] an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978); *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 265, 102 S.Ct. 3081, 3083, 73 L.Ed.2d 754 (1981). In *Abney v. United States,* 431 U.S. 651, 659–60, 97 S.Ct. 2034, 2040, 52 L.Ed.2d 651 (1977), the Court, applying *Cohen,* held that an interlocutory order denying defendant's pre-trial motion to dismiss an indictment on double jeopardy grounds was immediately appealable. And in *Helstoski v. Meanor,* 442 U.S. 500, 506–08, 99 S.Ct. 2445, 2448–49, 61 L.Ed.2d 30 (1979), the Court held immediately reviewable a Congressman's pre-trial claim that the Speech and Debate clause immunized him from criminal prosecution. Both *Abney* and *Helstoski,* in addition to satisfying the other requirements of *Cohen,* involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Hollywood Motor,* 458 U.S. at 266, 102 S.Ct. at 3084. The defendants in those two cases raised claims based upon "the right not to be tried, which must be upheld prior to trial if it is to be enjoyed at all." *United States v. MacDonald,* 435 U.S. 850, 860–61, 98 S.Ct. 1547, 1552–53, 56 L.Ed.2d 18 (1978).

In *United States v. Hastings,* 681 F.2d 706 (11th Cir.), *stay denied,* ––– U.S. –––, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1982), the court concluded that a claim identical to the one raised here was an appealable collateral order. The defendant there, as here, contended that, under the separation of powers principle, an active federal judge has an absolute right not to be indicted and tried in a federal court unless and until he is impeached and convicted by Congress and removed from office. The court stated:

> Like the right secured by the speech or debate clause in *Helstoski* or the right secured by the double jeopardy clause in *Abney,* the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it.

(*Id.* at 708)

We agree with *Hastings* and conclude we have jurisdiction to review the merits of

Claiborne's claim. *See also United States v. Myers,* 635 F.2d 932, 935–36 (2nd Cir.1980) (Congressman's claim of immunity from criminal prosecution under separation of powers principle held immediately appealable.)

II. *Merits*

[3] Article III of the Constitution affords members of the federal judiciary substantial protections to assure their freedom from coercion or influence by the executive and legislative branches. Specifically, federal judges are appointed for life terms, subject only to removal by impeachment; they hold their offices "during good behavior"; and their compensation cannot be diminished during their continuance in office. *See United States ex rel. Toth v. Quarles,* 350 U.S. 11, 15–16, 76 S.Ct. 1, 4–5, 100 L.Ed. 8 (1955). In addition to these specific constitutional safeguards, federal judges, like state judges, enjoy an absolute common law immunity from civil liability for acts committed in their official capacity. *Stump v. Sparkman,* 435 U.S. 349, 355–57, 98 S.Ct. 1099, 1104–05, 55 L.Ed.2d 331 (1978).

[4] However, in accordance with a system of checks of balances, the Framer's of the Constitution gave the legislative branch the power to deal with acts of misconduct by federal judges. Art. II, § 4 provides that "all civil officers of the United States [3] shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors". The House of Representatives is given the sole power of impeachment. Art. I, § 2. The Senate is given the sole power to try all impeachments. Art. I, § 3. The legislative power is limited insofar as the judgment entered after a conviction on impeachment cannot go beyond removal from office and disqualification to hold future office. Art. I, § 3. Also, "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." Art. I, § 3 cl. 7.

There is no specific constitutional provision limiting the executive branch's power to prosecute federal judges on criminal charges; nor is there any provision excepting federal judges from the executive branch's broad authority "to take care that the laws be faithfully executed." Art. II, § 3. Claiborne, however, contends that the Constitution's grant to the legislative branch of the power to remove a judge for high crimes and misdemeanors and the general principles of separation of powers preclude the executive branch from prosecuting him on criminal charges unless and until he has been removed from office by impeachment.

[5] Identical immunity claims were squarely faced and rejected in *United States v. Hastings,* 681 F.2d 706, 709–11 (11th Cir.), *stay denied,* —— U.S. ——, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1982) and *United States v. Isaacs,* 493 F.2d 1124, 1141–1144 (7th Cir.), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).[4] Both *Hastings* and *Isaacs* held that the Constitution does not immunize a sitting federal judge from the processes of criminal law. The sentiment underlying these holdings is that: "no man in this country is so high that he is above the law .... A judge no less than any other man is subject to the processes of the criminal law". *Hastings,* 681 F.2d at 711; *Isaacs,* 493 F.2d at 1133. We wholeheartedly agree with *Hastings* and *Isaacs* and are substantially guided by them in disposing of Claiborne's arguments.

Claiborne's first argument is that specific constitutional provisions give Congress the exclusive primary jurisdiction to try and punish federal judges for high crimes and misdemeanors through the impeachment process. He principally relies upon Article I, § 3 cl. 7 which states:

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[3] Federal judges are "civil officers" within the meaning of this clause. *Shurtleff v. United States,* 189 U.S. 311, 316, 23 S.Ct. 535, 536, 47 L.Ed. 828 (1903).

[4] *Hastings* and *Isaacs* are the only two cases where an indicted federal judge has claimed immunity from criminal prosecution prior to impeachment. Two other active federal judges were indicted on criminal charges, but neither raised the immunity issue. *See Hastings,* 681 F.2d at 706 n. 7.

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

According to Claiborne, this language means that a federal judge cannot be indicted and tried in an Article III court unless he has been removed from office by the impeachment process. Both *Isaacs* and *Hastings* rejected this tortured interpretation, concluding that § 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." *Isaacs,* 493 F.2d at 1142, *citing* R. Berger, *Impeachment: The Constitutional Problem,* at 78–80 (1973); *Hastings,* 681 F.2d at 710. *Hastings* states:

> [S]ection 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural right of the accused during the impeachment process. Like article III, § 2 cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings, section 3 serves to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.

(footnotes omitted.)

We agree with the Fifth and Seventh Circuits' reading of Article I § 3 cl. 7.

Claiborne also contends the Constitution's vesting of impeachment power exclusively in the Congress precludes criminal prosecutions of sitting federal judges. Two very important assumptions underlie this contention. First, impeachment is the exclusive means of removing federal judges from office; and second, a criminal prosecution is the equivalent of removal from office. We, like the court in *Hastings,* are unwilling to accept this second assumption. *See Hastings,* 681 F.2d at 710 n. 10. In *Burton v. United States,* 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057 (1906), a United States Senator made the comparable claim that a criminal conviction was the equivalent of expulsion from the Senate, which required a two thirds vote of the Senate. The Court rejected this claim, stating: "the final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment". *Id.* at 369, 26 S.Ct. at 694. In *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), both Mr. Justice Douglas and Mr. Justice Black noted the important distinction between criminal proceedings and impeachment proceedings against federal judges. Justice Black, while emphasizing that federal judges could be removed from office only by impeachment, stated that "judges, like other people, can be tried, convicted, and punished for crimes". *Id.* at 141–42, 90 S.Ct. at 1682–83. Justice Douglas stated that "[i]f they [federal judges] break a law they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress." *Id.* at 140, 90 S.Ct. at 1682. Finally, the legislative history of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. § 372) is replete with statements recognizing that while Congress retains the exclusive power to remove federal judges from office for high crimes and misdemeanors, federal judges, like other people, are subject to criminal prosecution for their misdeeds.[5]

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[5] *Judicial Tenure and Discipline 1979–80: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary,* 96th Cong. 1st and 2nd Sess. (1979–80).

Hunter, Elmo B., Judge, Western District of Missouri representing the Judicial Conference of the United States testified:

> Certainly, the members of the Court Administration Committee and of the Judicial Conference have been especially sensitive to that concern. They recognize that judges

Claiborne's second line of argument finds its source in the salutary principles of separation of powers and judicial independence. Like the defendant in *Hastings,* he asserts that the judiciary would be subject to intolerable pressures from the executive branch if executive officers were permitted to prosecute active federal judges. He avers that immunity from criminal liability is a necessary complement to the specific safeguards of Article III—most significantly, life tenure during good behavior. We disagree. Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing. *See Isaacs,* 493 F.2d at 1143. *Hastings,* 681 F.2d at 711. As the Supreme Court stated in *United States v. Lee,* 106 U.S. 196, 220, 1 S.Ct. 240, 260, 27 L.Ed. 171 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with

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> have no right to be insulated from the consequences of their own misbehavior when it impairs the proper operation of the courts and the administration of justice.
>
> . . . . .
>
> *First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.*

Id. at 54–55. (Emphasis added).

Rodino, Peter W. (Rep. D. NJ) Chm. House Judiciary Committee testified:

> I believe [the impeachment process] was designed so in order that we be very careful and very deliberate about the application of this process of impeachment, and I think that if we look back, *we find that impeachment being an action that is taken only as of last resort, really would serve us well only in such instances and only after all other possible actions may have been taken to cure whatever the problem may have been.*
>
> . . . . .
>
> *I just want to remind you that the Constitution itself provides that impeachment is no substitute for the ordinary application of the criminal laws, since in article I, section 3, it specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing, and indeed may be brought to the bar of justice for the violation of any criminal statute.*

Kastenmeier, Robert W., Chairman of Subcommittee stated:

> I would certainly concur with what the chairman [Rodino] said, that impeachment doesn't mean that you only try people who are guilty of violation of criminal laws; nor does it mean that you cannot be subjected to punishment under the criminal laws, even though impeachment does not occur.

Id. at 138.

McClory, Robert, ranking minority member stated:

> *For instance, if a circuit council received evidence that a crime had been committed, it would be inappropriate, it seems to me, to refer it to the Judiciary Committee for impeachment. Instead, it should be referred to a grand jury to determine whether or not the person should be indicted and tried. I believe that we want to avoid in legislation a requirement that all cases should be referred to the House Judiciary Committee for impeachment.*

Id. at 141. (emphasis added).

Rosenberg, Maurice, Asst. Atty. Gen. Office for Improvements in the Admin. of Justice, stated:

> In terms, impeachment applies only if the offense is treason, bribery, high crimes, and other misdemeanors, but misconduct of that kind is, of course, a criminal offense and will be prosecuted criminally. Just a few days ago, on March 27, Chairman Rodino and the ranking minority member, Mr. McClory, testified that in the event criminal actions are brought against a Federal judge, as I understand it, the Judiciary Committee on the House side will stay its hand as far as impeachment proceedings are concerned until the criminal proceedings have run their course. If they eventuate in a conviction, then I don't expect that we will see in the future—we have not seen in the past—any judge remain on the bench after his conviction of an impeachable crime.
>
> That means if the sequence is criminal process first, then impeachment, we simply are not going to see impeachment used. The criminal process is so much broader than the impeachment process that impeachment is sort of a supplement to prosecution, its purpose being to remove a judge convicted of a serious crime. Impeachment is not going to be often-used or effective if there is need for taking action against judges who have been guilty of reprehensible behavior that doesn't rise to the level of criminal prosecutability.

See also S.Rep. No. 362, 96th Cong. 1 Sess. 4 (1979), *reprinted in* [1980] U.S.Code & Ad. News 4315, 4318–19; H.R.Rep. No. 1313, 96th Cong., 2d Sess. 5 (1980).

Claiborne suggests the 1980 Act includes a determination by Congress that active federal judges may not be prosecuted by the Executive. In view of the foregoing legislative history and the language of the 1980 Act, we agree with *Hastings* that this claim is totally devoid of merit. *See Hastings,* 681 F.2d at 712 n. 20.

> impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The Supreme Court has applied *Lee's* rationale in rejecting Congressmen's claims that they were immunized from criminal prosecution prior to expulsion. *See Burton v. United States,* 202 U.S. 344, 368, 26 S.Ct. 688, 693, 50 L.Ed. 1057 (1906); *United States v. Brewster,* 408 U.S. 501, 516–20, 92 S.Ct. 2531, 2539–41, 33 L.Ed.2d 507 (1972). In *Brewster,* for example, a Senator charged with having taken a bribe (18 U.S.C. § 201) claimed that the Speech or Debate clause precluded criminal prosecution. The Court rejected this claim stating:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make members of Congress super-citizens, immune from criminal responsibility.
>
> . . . . . .
>
> The sweeping claims of appellee would render members of Congress virtually immune from a wide range of crimes simply because the acts were peripherally related to their holding office.
>
> . . . . . .
>
> Depriving the Executive of the power to investigate and prosecute . . . bribery is unlikely to enhance legislative independence.
>
> *Id.* at 516, 520, 525, 92 S.Ct. at 2539, 2541, 2544.

We similarly think it unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws. First, aside from Article III safeguards, judges enjoy the same protection as ordinary citizens do from vindictive prosecution. *Hastings,* 681 F.2d at 711. Second, as *Brewster* emphasized, a criminal prosecution encounters several procedural barriers—such as the indictment, burden of proof, and presumption of innocence. The Court in *Isaacs,* referring to these and other procedural safeguards afforded a criminal defendant, concluded that the independence of the judiciary is better served when criminal charges against judges are tried in court rather than in Congress. *Isaacs,* 493 F.2d at 1144. Indeed, it is all too well known that the impeachment process is particularly cumbersome, time consuming, and susceptible to political whim and emotional reaction. Third, the possible abuse by the executive branch is minimized because "[t]he check and balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." *Brewster,* 408 U.S. at 520, 92 S.Ct. at 2541. Finally, it is important to recognize that "criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operation of a branch of government." *Isaacs,* 493 F.2d at 1144. As perceptively noted in *Brewster,* 408 U.S. at 526, 92 S.Ct. at 2544: "Taking a bribe is, obviously, no part of the legislative process or function". This applies equally to the judicial branch.

In support of his claim that judicial independence will be substantially diminished without criminal immunity, Claiborne focuses on the practical consequences of an acquittal on criminal charges. He suggests that, if acquitted, his impartiality will be called into question every time he sits in a case in which the executive branch is a party. Purportedly, this will unduly diminish Claiborne's judicial authority and disrupt the judiciary's ability to administer its own affairs.

Though this argument has some persuasive appeal it does not carry the day. First, we think Claiborne has overstated the ability of the executive branch to force the recusal of an acquitted federal judge on bias grounds. The Supreme Court has stated that the trial judge's bias is presumed only where the judge has a personal or financial stake in the outcome or has been the target of personal abuse or criticism. *See Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975); *Taylor v. Hayes,* 418 U.S. 488, 501–03, 94 S.Ct. 2697, 2704–05, 41 L.Ed.2d 897 (1974); *see also* S.Rep. No. 419, 93d Cong. 1st Sess. 5 (1973). (The "appearance of impartiality" test of 28 U.S.C. § 455(a) was not intended to "warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial.") The second and more compelling reason we reject Claiborne's claim is that the proposed solution to the problem is much worse than the problem itself. As *Hastings* states, "the minuscule incremental judicial independence that might be derived from [a rule granting sitting federal judges immunity from criminal prosecution] would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law." 681 F.2d at 711. It can scarcely be doubted that the citizenry would justifiably lose respect for and confidence in a system of government under which judges were apparently held to be above the processes of the criminal law.[6]

III. *Non-appealable Claim*

Claiborne's second claim on this appeal is that the government's investigation and prosecution was motivated by a desire to retaliate against him for the manner in which he had exercised the functions of his office. He claims that the constitutional principal of an independent federal judiciary requires that the district court hold pre-trial evidentiary hearings to determine whether the executive's prosecution was improperly motivated.

[6, 7] Claiborne raises what is essentially a vindictive or selective prosecution claim, which is not immediately appealable under "the collateral order" exception. *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 270, 102 S.Ct. 3081, 3085, 73 L.Ed.2d 754 (1982). Under the logic of *Hollywood Motor,* such a claim fails to meet *Cohen's* requirement of being "effectively unreviewable on appeal from final judgment." To afford Claiborne the interlocutory relief he seeks in the name of judicial independence would have the effect of giving him more protection that ordinary citizens raising similar claims enjoy. *See Hastings,* 681 F.2d at 711.

IV. *District Courts Jurisdiction to Proceed*

Having determined that Claiborne's first claim, though appealable, lacks merit, we must determine whether the district court ever lost jurisdiction to proceed. Specifically, we must decide whether the district court had jurisdiction to hear the pre-trial motions of February 21, 1984.

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[6] In urging ***Hastings*** and ***Isaacs*** were wrongly decided, Claiborne relies heavily on ***Northern Pipeline Construction Co. v. Marathon Pipeline Co.,*** 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) and ***Nixon v. Fitzgerald,*** 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). Both cases are inapposite and of no aid to Claiborne. ***Northern Pipeline,*** which invalidated the Bankruptcy Act of 1978 insofar as it conferred Article III powers on non Article III judges, simply emphasized the importance of providing Article III judges with the appropriate protections of salary stability and life tenure. ***Nixon v. Fitzgerald,*** giving the President absolute immunity from civil damages for his official acts, merely cites cases recognizing that judges are absolutely immune from civil liability for acts committed in their official capacity. The "public interest" justification for granting immunity in civil suits against judges would not similarly apply to criminal actions. ***See O'Shea v. Littleton,*** 414 U.S. 488, 503, 94 S.Ct. 669, 679, 38 L.Ed.2d 674 (1974), where the court states:

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of Constitutional rights. ***Cf. Ex parte Virginia,*** 100 U.S. 339 [25 L.Ed. 676] (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so as to immunize criminal conduct proscribed by an Act of Congress ...." ***Gravel v. United States,*** 408 U.S. 606, 627 [92 S.Ct. 2614, 2628, 33 L.Ed.2d 583] (1972).

Cf. Dennis v. Sparks, 449 U.S. 24, 28 n. 5, 101 S.Ct. 183, 187 n. 5, 66 L.Ed.2d 185 (1980) (1980) (state judge who is immune from civil liability is not immune from criminal liability).

[8] Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under *Abney*, the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved. *United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1252 (9th Cir.1980), *citing Moroyoqui v. United States*, 570 F.2d 862, 864 (9th Cir.1977), *cert. denied*, 435 U.S. 997, 98 S.Ct. 1651, 56 L.Ed.2d 86 (1978); *United States v. Garner*, 663 F.2d 834, 837–38 (9th Cir.1981); *United States v. Burt*, 619 F.2d 831, 838 (9th Cir. 1980). *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). This divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. *United States v. Leppo*, 634 F.2d 101, 104 (3rd Cir.1980); *United States v. Hitchmon*, 602 F.2d 689, 691–92 (5th Cir.1979) (en banc). Given this purpose, it has been suggested that "the rule should not be employed to defeat its purpose or to induce needless paper shuffling." 9 J. Moore, *Federal Practice*, ¶ 203.11 at 3–44 n. 1 (1980); *see also* C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3949, at 358–59 (1977).

The divestiture rule takes on added significance when applied to interlocutory *Abney*-type criminal appeals since two important countervailing policies are at work. On the one hand, a defendant raising a meritorious *Abney*-type claim—asserting a valid, constitutional "right not to be tried" —would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal. On the other hand, under an automatic divestiture rule, a defendant raising a meritless *Abney*-type claim could significantly delay and disrupt criminal trial court proceedings. *Burt*, 619 F.2d at 838. *See also Abney*, 431 U.S. at 656–57, 97 S.Ct. at 2038–39 ("the delays and disruptions attendant upon intermediate appeal . . . are especially inimical to the effective and fair administration of the criminal law"). The Court in *Abney*, mindful of the need to balance these two interests, directed appellate courts to exercise their supervisory powers to establish summary procedures for quickly disposing of frivolous, dilatory pre-trial appeals.

The Fifth Circuit in *United States v. Dunbar*, 611 F.2d 985, 987–89 (5th Cir.), *cert. denied*, 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980) (en banc; twenty five judges) followed *Abney's* directive and adopted the "dual jurisdiction" rule that "appeal from the denial of a frivolous [*Abney*-type] motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous." This approach has been uniformly followed by other circuits. *United States v. Leppo*, 634 F.2d 101, 104 (3rd Cir.1980); *United States v. Head*, 697 F.2d 1200, 1204 n. 4 (4th Cir.1982); *United States v. Lanci*, 669 F.2d 391, 394 (6th Cir. 1982); *United States v. Cannon*, 715 F.2d 1228 (7th Cir.1983); *United States v. Grabinski*, 674 F.2d 677, 679 (8th Cir.1982) (en banc).

[9] The Ninth Circuit[7] implicitly adopted *Dunbar's* dual jurisdiction approach in *United States v. Spilotro*, 680 F.2d 612, 615 (9th Cir.1982) and in *United States v. Crozier*, 674 F.2d 1293, 1297 (9th Cir.1982). Both *Spilotro* and *Crozier* held that the interlocutory review of a collateral order restraining the sale or transfer of defendant's property did not divest the district court of jurisdiction to proceed. The Ninth Circuit, however, has yet to adopt *Dunbar* in the context of an *Abney*-type claim in-

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[7] Sitting as special panel for the Ninth Circuit, we are bound by applicable Ninth Circuit case law.

volving a "right not to be tried". This reluctance is due to the Ninth Circuit's concern that a defendant who has raised a meritorious *Abney*-type claim would be irreparably harmed if the trial court were allowed to proceed to trial prior to the appellate court's disposition of the claim. *Burt,* 619 F.2d at 838. This concern is not as vitally involved when only pre-trial hearings proceed in the district court rather than the trial itself. Because this court has now determined that Claiborne's asserted "right not to be tried" claim lacks merit, the trial court's continuation of pre-trial hearings was harmless. Requiring the district court to rehear and rule again on the same matters would achieve nothing other than to significantly disrupt and delay an ongoing criminal trial, a result running afoul of the purpose behind the divestiture rule and the court's dictum in *Abney.* As the court stated in *Leppo,* 634 F.2d at 104, "[a] ritualistic application of the divestiture rule in the *Abney* context conflicts with the public policy favoring rapid adjudication of criminal prosecutions."

The district court scrupulously followed the procedures set forth in *Dunbar* by finding, as a predicate to its assertion of retained jurisdiction, that Claiborne's separation of powers claim was frivolous. Though we now disagree with that characterization of Claiborne's claim, no useful purpose would be served by requiring that court to redecide the pre-trial motions of February 21, 1984. Under the circumstances, therefore, it was harmless for the district court to proceed to hear the motions of February 21, 1984. *See Hastings,* 681 F.2d at 709, n. 4. (Court, while characterizing defendant's separation of powers claim as "nonfrivolous", nevertheless recognized that under *Dunbar* "the trial court could have determined that the issues raised . . . were frivolous and then proceeded to trial without awaiting the determination of the court of appeals").

However, in view of the jurisdictional problems to which we have referred, we suggest that the district court re-enter on the record the motions, findings, and other matters contained in the hearing transcript of February 21, 1984, without the need for reargument or retaking testimony.

We therefore affirm the district court's order denying Claiborne's motion to quash the indictment; we deny the petitions for writs of mandamus and prohibition, and deny as moot the renewed motion for a stay. Let the mandate issue forthwith.

Harry Eugene CLAIBORNE, United States District Judge

v.

UNITED STATES.

No. A–725.

March 12, 1984.

Contentions of federal judge, who was under federal indictment, that a sitting judge may not be criminally prosecuted before being removed from office by impeachment and that the Government prosecuted him to punish him for his judicial decisions were rejected by the Court of Appeals for the Ninth Circuit, and the judge petitioned for stay. Justice Rehnquist, as Circuit Judge, found that stay was not warranted.

Application denied.

Federal Courts ⚿446

Request by sitting federal judge who was under federal indictment, to stay criminal proceedings on ground that sitting judge may not be prosecuted before being removed by impeachment, that judge was subject of selective prosecution and that because first claim was appealable under collateral order doctrine the district court lost jurisdiction to determine other pretrial matters, was denied. (Per Justice Rehnquist, as Circuit Judge.)

Justice REHNQUIST, Circuit Justice.

Harry Eugene Claiborne, the applicant, is a sitting United States Judge in the District Court for the district of Nevada. In December, 1983, he was indicted for violations of 18 U.S.C. § 201(c) and 18 U.S.C. § 1343. His contentions that a sitting federal judge may not be criminally prosecuted before being removed from office by impeachment, and that the government prosecuted him in order to punish him for decisions made as a federal judge, were rejected by the Court of Appeals for the Ninth Circuit, —— F.2d ——. He requests that I stay the criminal proceedings against him, scheduled to commence today, in order that this Court may review these determinations.

The first contention—that a federal judge may not be indicted and tried for a criminal offense until he is first impeached and convicted by Congress—has been rejected not only by the Court of Appeals in this case but by the only two other Courts of Appeals to consider the question. *United States v. Hastings,* 681 F.2d 706 (5th Cir. 1982); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir.1974). This Court denied a stay in *Hastings,* —— U.S. ——, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983), and denied certiorari in *Isaacs,* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974).

Applicant's second claim appears to be a species of "vindictive" or "selective" prosecution, and the fact that he is a sitting federal judge does not seem to me to remove the claim from the principles most recently discussed in *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982). I think the Court of Appeals was correct in concluding that the denial of relief on this claim by the District Court was not immediately appealable under the "collateral order" doctrine.

Applicant finally contends that because the first of his claims was appealable under the collateral order doctrine, the District Court lost jurisdiction to determine other pre-trial matters pending resolution of the appeal by the Court of Appeals. The Court of Appeals applied the dual jurisdiction approach set forth in *United States v. Dunbar,* 611 F.2d 985 (5th Cir.), *cert. denied,* 447 U.S. 926, 100 S.Ct. 3022, 65 L.Ed.2d 1120 (1980), and rejected this claim.

I do not believe that four Justices of this Court would vote to grant certiorari to review any one of these claims at the present stage of this litigation, and I therefore deny the application.

MEMORANDUM DECISIONS

Cite as 105 S.Ct. (1984)

Harry Eugene CLAIBORNE, petitioner, v. UNITED STATES. No. 83-1992.

Former decision, 104 S.Ct. 1401.

Case below, 727 F.2d 842.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Oct. 1, 1984. Denied.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Harry E. CLAIBORNE,
Defendant-Appellant.

No. 84-1294.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 26, 1985.
Decided July 8, 1985.

Defendant was convicted in the United States District Court for the District of Nevada, Walter E. Hoffman, Senior District Judge, of willfully underreporting taxable income, and he appealed. The Court of Appeals, Pell, Senior Circuit Judge, sitting by designation, held that: (1) defendant, a federal district judge, could be prosecuted without prior impeachment by Congress; (2) indictment was not subject to dismissal on ground that perjured testimony was presented to grand jury where there was no evidence beyond mere speculation to support that assertion; (3) disclosure of tax returns was proper; (4) presentation of same or similar evidence to three grand juries did not constitute abuse of grand jury process; (5) employment of IRS and FBI agents by grand jury did not justify dismissal of indictment; (6) evidence was sufficient to support conviction; (7) trial court did not abuse its discretion in failing to excuse two jurors for cause; (8) summaries of interviews with defendant's accountant were not statements subject to disclosure under the Jencks Act; (9) failure to disclosure impeachment evidence contained in those summaries did not justify new trial; and (10) trial court did not abuse its discretion in sequestering defendant's secretary during recess in the middle of her testimony.

Affirmed.

1. Criminal Law ⇐878(4)

Jury's acquittal of defendant on charge that defendant, a federal district court judge, falsely reported his finances to Judicial Ethics Committee was not inconsistent with their verdict convicting him of filing false information in income tax return. 18 U.S.C.A. § 1001; 26 U.S.C.A. § 7206(1).

2. Judges ⇐38

Federal district court judge could be prosecuted for willfully underreporting his taxable income even though he had not been impeached by Congress. U.S.C.A. Const. Art. 1, § 1 et seq.; Art. 3, § 1 et seq.

3. Grand Jury ⇐2

Grand jury guaranty was included in Bill of Rights to protect wrongfully accused defendants against mistaken and vindictive prosecutions. U.S.C.A. Const. Amend. 5.

4. Grand Jury ⇐1

Grand jury serves important investigative functions in addition to serving as shield against unwarranted prosecution.

5. Indictment and Information ⇐144.1(1)

Defendants may overcome presumption of regularity which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on proper showing of grand jury abuse and defendants may establish such abuse by demonstrating that prosecutor obtained indictment by knowingly submitting perjured testimony to grand jury.

6. Constitutional Law ⇐265
Grand Jury ⇐34

Prosecutor's conduct in knowingly submitting perjured testimony to grand jury is arbitrary and capricious, violates due process, and must be condemned in exercise of court's supervisory powers. U.S.C.A. Const.Amend. 5.

7. Indictment and Information ⇐144.1(1), 144.2

Perjury before grand jury must be material to justify dismissal of indictment and courts should not presume that perjured testimony was material.

8. Indictment and Information ⇐144.1(1)

If sufficient nonperjurious testimony exists to support indictment, courts will not dismiss indictment due to presence of perjured testimony before grand jury.

9. Indictment and Information ⇐144.2

Grand jury indictment of federal district court judge on charges of willfully underreporting his taxable income and submitting false statement to Judicial Ethics Committee would not be dismissed on ground that prosecution knowingly presented perjurious testimony to grand jury where there was no showing beyond mere speculation that perjured testimony was presented to grand jury or that Government had any reason to believe that witness' testimony was perjured.

10. Indictment and Information ⇐10.1(4)

Agreement, under which witness agreed to testify truthfully before all grand and petit juries investigating or trying charges against defendant and government agreed to recommend reduction in witness' previously imposed sentences for tax fraud, was not fundamentally unfair where agreement did not make any benefit to witness contingent on defendant's indictment or conviction and thus agreement did not present invitation to perjury.

11. Criminal Law ⇐996(3)

Defendant lacked standing to contest reduction of sentence of witness who had made agreement with prosecution to testify truthfully before all grand and petit juries investigating or trying defendant in exchange for Government's recommendation for reduction in witness' previously imposed sentences for tax fraud.

12. Grand Jury ⇐33

Speculation cannot justify court's intervention into grand jury's proceedings.

13. Indictment and Information ⇐144.1(1)

Even if witness had perjured himself when testifying before grand jury, allegedly perjured testimony would not justify dismissal of indictment against defendant where alleged perjury pertained to counts in indictment which had been dismissed before trial and thus was not material to defendant's indictment on the other counts.

14. Internal Revenue ⇐4482

Disclosure of defendant's tax returns to Department of Justice for use in bribery case against defendant was proper. 26 U.S.C.A. § 6103(a, h, i).

15. Criminal Law ⇐394.2(1)

Suppression of defendant's tax return for improper disclosure to federal officers is inappropriate remedy even in cases of plain error. 26 U.S.C.A. § 6103(a, h, i).

16. Grand Jury ⇐36.8

Prosecution's presentation of same or similar evidence to successive grand juries impaneled in Oregon and to another grand jury impaneled in Nevada which returned indictment against defendant did not constitute abuse of grand jury process since adverse action or failure to act by previous grand jury does not limit or exhaust successor grand jury's power to investigate.

17. Indictment and Information ⇐144.1(1)

Even if Government's presentation of evidence to three grand juries could be considered to have violated principle underlying policy forbidding successive state and federal prosecutions for same crime, such violation did not compel dismissal of indictment.

18. Indictment and Information ⇐144.1(2)

Employment of IRS agent and four FBI agents as grand jury agents did not mandate dismissal of indictment where only one agent revealed his future status as grand jury agent to only one recipient of grand jury subpoena, no agent sought to immunize testimony of grand jury witnesses from future prosecution, and there was no indication that the agents were misusing their access to grand jury materials for civil enforcement purposes.

19. Grand Jury ⇐41.50(3)

Disclosure of grand jury materials to IRS and FBI agents who assisted prosecution in collecting evidence for grand jury was proper and did not require court order where there was no indication that agents sought access to the materials for purely civil purposes. Fed.Rules Cr.Proc.Rule 6(e)(3)(A)(ii), (e)(3)(C), 18 U.S.C.A.

20. Internal Revenue ⇐5263

Proof of willfulness is essential to support conviction for willfully underreporting taxable income. 26 U.S.C.A. § 7206(1).

21. Internal Revenue ⇐5263

To prove willfulness in prosecution for willfully underreporting taxable income, government must show that defendant intended to violate the law or knew that his actions would do so. 26 U.S.C.A. § 7206(1).

22. Internal Revenue ⇐5263

Neither careless disregard whether one's actions violate law nor gross negligence in signing tax return will suffice to prove willfulness in prosecution for willfully underreporting taxable income. 26 U.S.C.A. § 7206(1).

23. Internal Revenue ⇐5302

In prosecution for willfully underreporting taxable income, government may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. 26 U.S.C.A. § 7206(1).

24. Internal Revenue 🔑5263

In prosecution for willfully underreporting taxable income, defendant may rebut Government's proof of willfulness by establishing good faith reliance on qualified accountant after full disclosure of tax-related information but cannot shift his responsibility for deficiencies to accountant if he has withheld vital information or has taken steps to mislead his accountant. 26 U.S.C.A. § 7206(1).

25. Internal Revenue 🔑5302

In prosecution for willfully underreporting taxable income in 1979, evidence that defendant's accountant denied receiving letter in which defendant allegedly made full disclosure of his income to accountant supported jury's rejection of defendant's reliance defense. 26 U.S.C.A. § 7206(1).

26. Internal Revenue 🔑5302

Evidence was sufficient to support conviction for willfully underreporting taxable income for 1979. 26 U.S.C.A. § 7206(1).

27. Internal Revenue 🔑5302

In prosecution for willfully reporting taxable income in 1980, evidence that defendant had practiced law for 30 years and had served three years on federal bench during which he presided over some tax law disputes supported jury's rejection of defendant's claim of ignorance of tax issues. 26 U.S.C.A. § 7206(1).

28. Criminal Law 🔑1144.13(5)

In reviewing jury's decision to convict, Court of Appeals must draw all reasonable inferences from evidence in favor of government. 26 U.S.C.A. § 7206(1).

29. Jury 🔑33(5.1)

It is constitutionally impermissible to force defendants to exhaust their peremptory challenges to jurors on persons who should be excused for cause. U.S.C.A. Const.Amend. 6.

30. Jury 🔑33(5.1)

Even though forcing defendant to expend peremptory strikes may implicate Sixth Amendment, constitutional problem only arises in cases where prospective juror upon whom defendant spent peremptory challenge was actually biased and therefore should have been excluded by trial judge. U.S.C.A. Const.Amend. 6.

31. Jury 🔑103(6)

In prosecution for willfully underreporting taxable income, district court did not commit manifest error or abuse discretion in failing to excuse for cause two prospective jurors against whom defendant expended two peremptory challenges where, even though jurors indicated that they had preconception of guilt or innocence, both indicated that they would decide guilt or innocence impartially on evidence presented at trial. 26 U.S.C.A. § 7206(1).

32. Criminal Law 🔑627.7(3)

Summaries of interviews conducted by government agents with witness were not statements subject to disclosure under the Jencks Act [18 U.S.C.A. § 3500] where witness did not draft the summaries or otherwise approve their contents.

33. Criminal Law 🔑627.7(3)

Summaries of interviews conducted by government agents with witness were not statements subject to disclosure under the Jencks Act [18 U.S.C.A § 3500] where summaries did not purport to transcribe in substantially verbatim fashion witness' interviews but represented agents' selection of certain information conveyed by witness for possible use in the case and where summaries were not drafted contemporaneously with witness' responses.

34. Criminal Law 🔑1166(10.10)

Even if district court's refusal to disclose summaries of interviews conducted by government agents with defendant's accountant to defendant being prosecuted for willfully underreporting taxable income was clearly erroneous or abuse of discretion, decision did not prejudicially affect defendant's substantial rights where only information contained in summaries that could be damaging to accountant's credibility was his admission that he lost or mislaid some records during his move to new office but record demonstrated that defendant did cross-examine accountant with respect to this loss of records. 18 U.S.C.A. § 3500.

35. Criminal Law ⇐1166(10.10)

In prosecution for willfully underreporting taxable income, prosecution's failure to deliver government summaries of interviews with defendant's accountant pursuant to defendant's general request for exculpatory information did not justify new trial where disclosure of the summaries would not have created any reasonable doubt, in that defendant already had access to most damaging impeachment evidence contained in the summaries, and same result would have been obtained even if request had been specific.

36. Criminal Law ⇐665(1)

In prosecution for willfully underreporting taxable income, trial court did not abuse its discretion by sequestering defendant's secretary during brief recess in middle of her testimony where sequestration was apparently ordered to prevent improper influences upon her testimony.

Steven A. Shaw, Jan Nielsen Little, Public Integrity Section, Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Oscar B. Goodman, Goodman, Terry, Stein & Quintana, Las Vegas, Nev., J. Richard Johnston, Oakland, Cal., William Raggio, Reno, Nev., for defendant-appellant.

Appeal from the United States District Court for the District of Nevada.

Before PELL, LUMBARD, and McWILLIAMS, Senior Circuit Judges.*

PELL, Senior Circuit Judge.

A jury sitting in Reno, Nevada, convicted defendant Harry E. Claiborne on two counts charging that defendant willfully underreported his taxable income on his 1979 and 1980 tax returns. 26 U.S.C. § 7206(1) (1967). The jury acquitted defendant of one count charging that he submitted a false statement to the Judicial Ethics Committee. 18 U.S.C. § 1001 (1976). The district court sentenced defendant to a term of two years imprisonment plus a $5,000 fine on each tax count. Defendant appeals from the judgment of conviction on the two income tax counts.

I. THE FACTS

Defendant, who continues to hold office as a United States district judge, became a district judge for the District of Nevada on September 1, 1978. Prior to that time, defendant was engaged in a lucrative private practice in Las Vegas, Nevada, and had had an income of six figures annually. Upon entering the judiciary, defendant's annual salary was $58,000. In a 1980 letter requesting payment of legal fees he had earned before becoming a judge, defendant stated that he was in desperate financial straits. Approximately two years later, a federal grand jury in Portland, Oregon, began investigating allegations that defendant had accepted bribes from a Joseph Conforte in the performance of his official duties. Two subsequent grand juries, one again in Portland, Oregon, and one in Reno, Nevada, investigated these charges as well as allegations that defendant had understated his income in his 1979 and 1980 tax returns and had filed a false financial statement with the Judicial Ethics Committee. The term of the first Portland grand jury expired and the second grand jury there was not asked to return an indictment. The Reno grand jury, however, returned a seven count indictment against defendant, containing four charges relating to defendant's alleged bribery activities with Joseph Conforte, the two tax counts, and one count charging that defendant falsely reported his finances to the Judicial Ethics Committee.

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* Wilbur F. Pell, Jr., Senior Circuit Judge for the Seventh Circuit, J. Edward Lumbard, Senior Circuit Judge for the Second Circuit, and Robert H. McWilliams, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

Joseph Conforte appeared as a witness before the indicting grand jury. In exchange for Conforte's testimony, and his agreement to cooperate fully in further investigations of defendant and in his prosecution, the Government agreed to recommend a substantial reduction in sentences that Conforte had previously received for tax evasion. Subsequently, a federal judge ordered reduction of Conforte's sentences.

Defendant moved to dismiss the indictment returned against him on various grounds, all of which the district court rejected. The case then proceeded to trial. The district court ultimately declared a mistrial after the jury reported that it was hopelessly deadlocked.

[1] At this point, the Government voluntarily moved to dismiss the four Conforte bribery counts, stating in part: "The attorneys further believe that in the first trial of this case the presentation of evidence on Counts One, Two, Three and Four may have distracted the jury in its consideration of Counts Five, Six, and Seven and contributed to its inability to reach a verdict on those counts." Record at 204. Defendant then renewed all previous pretrial motions relating to the remaining three counts, all of which the district court denied, in some instances after a hearing. The case subsequently proceeded to trial for a second time, on the two tax counts and the count relating to the Judicial Ethics Committee. As we have noted, the jury convicted defendant on the two tax counts, but acquitted him on the count relating to the Ethics Committee.[1] Defendant challenges his conviction on a number of grounds, which we shall discuss in turn.

II. DEFENDANT'S CONTENTIONS

A. *Judicial Immunity from Prosecution*

[2] Defendant's first contention deserves minimal attention from this court. Defendant contends that Articles I and III of the United States Constitution, as well as the doctrine of separation of powers, prohibit the prosecution of a federal judge without prior impeachment by Congress. The parties concede that no impeachment proceedings have been brought against defendant. Defendant filed a pretrial motion covering these contentions, which the district court denied. This Court upheld the district court's denial of defendant's motion. *United States v. Claiborne,* 727 F.2d 842 (9th Cir.1984), *cert. denied,* — U.S. —, 105 S.Ct. 113, 83 L.Ed.2d 56.

In upholding the denial of defendant's motion, this court relied on two cases which dismissed similar claims. *United States v. Claiborne,* 727 F.2d at 845, *citing United States v. Hastings,* 681 F.2d 706 (11th Cir. 1982), *cert. denied,* 459 U.S. 1203, 103 S.Ct. 1188, 75 L.Ed.2d 434 (1983); *United States v. Isaacs,* 493 F.2d 1124 (7th Cir.1974) (per curiam), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146. These cases squarely held that the Constitution does not immunize a federal judge from criminal prosecution prior to impeachment. *United States v. Hastings,* 681 F.2d at 710–11; *United States v. Isaacs,* 493 F.2d at 1144. In view of the reasoning in *Hastings* and *Isaacs,* and in view of our previous opinion, in this case, squarely deciding this issue adversely to defendant, we see no reason to re-examine the question here.

We remark, in addition, that defendant's suggestion that the protections guaranteed by the Constitution to criminal defendants are inadequate to protect a federal district judge appears disingenuous from our review of the record, which appears to us to reflect that defendant was afforded a fair trial fully consistent with the protection of his constitutional rights.

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[1] The defendant points out in his brief that the jury acquitted him on Count VII, The Judicial Ethics Committee count, but convicted him on the two tax counts, which likewise involved the reporting of income. The defendant does not directly challenge these verdicts as being inconsistent. To the extent he indirectly does so, we do not regard them as inconsistent. Count VII related to a requirement that federal judges disclose certain information about their property and income in an annual report. The jury may well have regarded violation of this requirement as an entirely different crime from filing false information in an income tax return, because the latter involves a failure to pay money due the Government and acutely concerns the public interest.

B. *Intrusions into the Grand Jury's Independence*

Defendant's second contention, in which he seeks dismissal of his indictment, subsumes numerous challenges relating to the manner in which the prosecution obtained the indictment. These challenges, unlike defendant's first contention, merit some discussion from this court.

1. *The Conforte testimony and its effect on the grand jury*

Defendant contends that the prosecution knowingly presented the perjurious testimony of Joseph Conforte to the indicting grand jury, and that this testimony unconstitutionally biased the grand jury against him. Defendant maintains that the prosecution intentionally failed, in examining Conforte, to require Conforte to specify the exact dates on which incidents culminating in the alleged acts of bribery occurred, because the prosecution allegedly knew that the acts did not take place. Defendant additionally maintains that the prosecution amended its request for notice of defendant's intent to rely on an alibi defense three times before trial, each time changing the dates on which the alleged acts of bribery took place, because Conforte kept changing the details of his story. These acts, defendant asserts, amounted to the knowing presentation of perjured testimony, or at least an invitation to Conforte to perjure himself before the grand jury. Defendant asserts that Conforte's perjurious testimony irreparably biased the grand jury against him, in violation of the Due Process Clause of the Fifth Amendment. Alternatively, defendant asserts that the prosecution's behavior in obtaining and presenting the Conforte testimony justifies a dismissal of defendant's indictment in the exercise of this court's supervisory power.

[3, 4] We begin our analysis by examining the Fifth Amendment's grand jury guarantee in federal felony trials. That guarantee ensures that, except in certain military cases, "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend. V. Federal courts agree that the framers of the Bill of Rights included the grand jury guarantee in the Fifth Amendment to protect wrongfully accused defendants against mistaken and vindictive prosecutions. *See United States v. Dionisio,* 410 U.S. 1, 16–17, 93 S.Ct. 764, 772–773, 35 L.Ed.2d 67 (1973); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE (1980). Federal courts also agree, however, that the grand jury serves important investigative functions in addition to serving as a shield against unwarranted prosecution. *United States v. Calandra,* 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). As the Supreme Court observed in *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (citations omitted):

> It is a grand inquest, a body of powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime....

Id. at 688, 92 S.Ct. at 2660.

> When the grand jury is performing its investigatory function into a general problem area ... society's interest is best served by a thorough and extensive investigation. A grand jury investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed. Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether

> the procedures will result in an indictment can be made.

Id. at 701–02, 92 S.Ct. at 2667 (citations omitted).

In view of the grand jury's broad investigatory powers, and in view of the grand jury's duty not to determine guilt or innocence but to determine whether probable cause exists to believe that a crime has been committed, *United States v. Calandra,* 414 U.S. at 349, 94 S.Ct. at 620, the courts have sharply limited a defendant's ability to challenge the nature of evidence presented to a grand jury. *See Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (holding that a grand jury witness may not refuse to answer questions on the ground that the questions were based on evidence derived from an unlawful search and seizure); *Costello v. United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (barring a challenge based on the exclusive use of hearsay before a grand jury); *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (prohibiting a challenge to subpoenaed evidence based on defendant's privilege against self-incrimination). In so doing, the courts have recognized that such evidentiary challenges are best resolved in the adversary arena of a criminal trial. *United States v. Short,* 671 F.2d 178, 183 (6th Cir.1982), *cert. denied,* 457 U.S. 1119, 102 S.Ct. 2932, 73 L.Ed.2d 1332. In order to ensure that trials and not pretrial inquiries into the grand jury process resolve such challenges, the courts have attached a presumption of regularity to grand jury proceedings. *See United States v. Woods,* 544 F.2d 242, 250 (6th Cir.1976), *cert. denied,* 429 U.S. 1062, 97 S.Ct. 787, 50 L.Ed.2d 778 (1977); *Beverly v. United States,* 468 F.2d 732, 743 (5th Cir.1972).

[5, 6] Notwithstanding these limitations on a defendant's ability to challenge the evidence presented to a grand jury, the cases do recognize that defendants may overcome the presumption of regularity which attaches to grand jury proceedings and obtain dismissal of indictments returned against them on a proper showing of grand jury abuse. *United States v. Samango,* 607 F.2d 877, 881 (9th Cir.1979). Defendants may establish such grand jury abuse by demonstrating that the prosecutor obtained an indictment by knowingly submitting perjured testimony to the grand jury. *United States v. Thompson,* 576 F.2d 784, 786 (9th Cir.1978), *United States v. Kennedy,* 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied,* 435 U.S. 944, 98 S.Ct. 1526, 55 L.Ed.2d 541 (1978). The courts reason that such conduct is arbitrary and capricious and therefore violates due process or that such conduct must be condemned in the exercise of the courts' supervisory powers. *United States v. Al Mudarris,* 695 F.2d 1182, 1185 (9th Cir.1983), *cert. denied,* 461 U.S. 932, 103 S.Ct. 2097, 77 L.Ed.2d 305. Indeed, a decision of this court requires a prosecutor who discovers perjury by a grand jury witness after indictment to inform the defendant, the trial court, and the grand jury of the perjury so that the grand jury may reconsider its decision to indict. *United States v. Basurto,* 497 F.2d 781, 785–86 (9th Cir.1974).

[7, 8] The cases agree, however, that perjury before a grand jury must be material to justify dismissal of the indictment. *United States v. Bracy,* 566 F.2d 649, 655 (9th Cir.1977), *cert. denied,* 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978); *United States v. Bowers,* 534 F.2d 186, 193 (9th Cir.1976) (per curiam), *cert. denied,* 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 311; *Coppedge v. United States,* 311 F.2d 128, 132 (D.C.Cir.1962). Moreover, courts should not presume that perjured testimony was material. *United States v. Kaplan,* 554 F.2d 958 (9th Cir.1977) (per curiam), *cert. denied,* 434 U.S. 956, 98 S.Ct. 483, 54 L.Ed.2d 315. As a consequence, if sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due to the presence of perjured testimony before the grand jury, on the assumption that the grand jury would have returned an indictment without the perjurious evidence. *Coppedge v. United States,* 311 F.2d at 131–32. In a similar vein, other courts confronted with evidence of perjured testimony before a grand jury presume that no prejudice thereby resulted to defendant and therefore refuse to dismiss the grand jury's indictment. *United States v. Adamo,* 742 F.2d 927, 941 (6th Cir.1984).

[9–12] In the case before us, defendant contends that the perjurious testimony of Joseph Conforte before the grand jury did result in actual prejudice because the grand jury would not have returned an indictment without it. There is no evidence to support these assertions. The defendant has made no showing, beyond mere speculation, that Conforte gave perjured testimony before the grand jury or at the first trial. Nor has he made any showing that the Government had any reason to believe that Conforte's testimony was perjured.[2] Speculation cannot justify this court's intervention into the grand jury's proceedings. *See United States v. Chanen,* 549 F.2d 1306, 1312 (9th Cir.1977) (discussing separation of powers reasons for court's refusal to intervene in grand jury proceedings), *cert. denied,* 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83. Under these circumstances, the Government's presentation of Conforte's testimony to the grand jury was not the sort of flagrant misconduct required to justify dismissal of the indictment under the Due Process Clause or our supervisory powers. *United States v. Sears, Roebuck & Co.,* 719 F.2d 1386, 1391–92 (9th Cir.1983), *cert. denied,* — U.S. —, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

[13] Moreover, even if Conforte perjured himself before the grand jury, we note that Conforte's testimony related only to Counts I through IV of the indictment, and that the Government moved to dismiss these "Conforte" counts before proceeding to trial (for the second time) against defendant. Thus, any perjury committed by Conforte before the grand jury was not *material* to defendant's indictment on Counts V through VII and necessarily was not material to defendant's conviction on Counts V and VI. *See United States v. Bracy,* 566 F.2d 649, 656 (9th Cir.1977) (defining material perjury as evidence that creates a reasonable doubt with respect to defendant's guilt that did not otherwise exist), *cert. denied,* 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 109 (1978). *See also Laughlin v. United States,* 385 F.2d 287, 291 (D.C.Cir.1967) (examining taint solely with respect to the charges of which defendant was convicted), *cert. denied,* 390 U.S. 1003, 88 S.Ct. 1245, 20 L.Ed.2d 103 (1968). Indeed, Conforte did not appear as a witness at defendant's second trial. Under these circumstances, this court perceives no prejudice resulting from the presentation of Conforte's testimony to the grand jury. In any event, there can be no claim, and there is no claim, that there was insufficient nonperjured evidence to justify the indictment of the defendant on the tax counts and the ethics count. *See Talamante v. Romero,* 620 F.2d 784, 791 (10th Cir.1980) (finding it unlikely the grand jury would have declined to indict defendant in view of the petit jury's finding of guilt after a full trial), *cert. denied,* 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99. As a result, we find that the trial judge committed no abuse of discretion in refusing to dismiss defendant's indictment due to presentation of perjury before the grand jury. *United States v. Noti,* 731 F.2d 610, 613 (9th Cir.1984).

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[2] We note that defendant also raises objections to the manner in which the Government procured Conforte's testimony. Specifically, defendant contends that the Government's deal with Conforte, under which Conforte agreed to testify truthfully before all grand and petit juries and the Government agreed to recommend a reduction in Conforte's previously imposed sentences for tax fraud, among other offenses, was fundamentally unfair. We disagree, and observe that the agreement did not make any or all benefits to Conforte contingent on defendant's indictment or conviction. *See United States v. Dailey,* 759 F.2d 192, 197 (1st Cir.1985). Thus, the agreement did not present an invitation to perjury. *Id.* We note, in addition, that the district court correctly determined that defendant lacked standing to contest the reduction of Conforte's sentence. Finally, we note that defendant misinterprets this court's construction of the 120-day period set forth in Rule 35(b) of Federal Rules of Criminal Procedure. Contrary to defendant's assertion, this court allows reduction of sentence within a reasonable time following the expiration of 120 days. *United States v. Smith,* 650 F.2d 206 (9th Cir.1981).

2. *Obtaining access to defendant's tax returns for use in a non-tax case*

Next, defendant challenges the manner in which the prosecution obtained access to defendant's tax returns. Defendant asserts that the prosecution obtained access to the returns in violation of 26 U.S.C. § 6103(a), because the prosecution sought the returns for use in a judicial proceeding relating to tax administration while claiming to seek the returns for use in a non-tax case. Defendant asserts that the procedures required for disclosure in tax-related cases are more stringent than those required for disclosure in non-tax cases. Specifically, defendant contends that Internal Revenue Service guidelines require routine procedures including audits and conferences between Internal Revenue Service and Department of Justice officials before transfer of a case from the Internal Revenue Service to the Department of Justice. Defendant contends that these routine steps were not taken here and that, therefore, the prosecution should not have submitted the returns to the grand jury.

We disagree. First, although 26 U.S.C. § 6103(a) protects an individual's privacy interest in his or her tax returns and tax return information, subsections (h) and (i) of that section permit disclosure of tax returns to federal officers and employees in both tax and non-tax cases. 26 U.S.C. § 6103(a), (i) (1985 Supp.); 26 U.S.C. § 6103(h) (1980). Contrary to defendant's assertions, these subsections prescribe more severe procedures for access to tax returns in non-tax cases than in tax cases. *Id. See also United States v. Mangan*, 575 F.2d 32, 38 (2d Cir.1978), *cert. denied*, 439 U.S. 931, 99 S.Ct. 320, 58 L.Ed.2d 324.

[14, 15] In this case, the district court granted disclosure of defendant's tax returns to the Department of Justice pursuant to 26 U.S.C. § 6103(i) for use in the prosecution's bribery case against defendant. 26 U.S.C. § 6103(i) (1985 Supp.). We find that this disclosure was proper. We note that the prosecution could also have obtained access to the returns for use in its tax case against defendant, by virtue of section 6103(h). 26 U.S.C. § 6103(h) (1980).[3] As a result, even if the district court's disclosure of defendant's tax returns under section 6103(i) was improper, any error thereby resulting to defendant was harmless. *Cf. Davidson v. Brady*, 559 F.Supp. 456, 461 (W.D.Mich.1983). We additionally acknowledge, and concur with, the many cases holding that suppression of a defendant's tax return is an inappropriate remedy even in cases of plain error. *Marvin v. United States*, 732 F.2d 669, 673 (8th Cir.1984); *United States v. Barnes*, 604 F.2d 121, 146 (2d Cir.1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

3. *Investigation by three grand juries*

[16] Third, defendant contends that the prosecution's presentation of the same or similar evidence to three grand juries constituted an abuse of the grand jury process in violation of *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960), because it bifurcated the prosecution's investigation of defendant's case. Successive grand juries impaneled in Portland, Oregon, investigated defendant's case but for the reasons stated above did not return

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[3] Although defendant claims that Internal Revenue Service guidelines specified several procedural steps to be taken prior to release of tax information in tax-related cases, defendant concedes that no case requires adherence to any such guidelines. We note that *In re Gruberg*, 453 F.Supp. 1225, (S.D.N.Y.1978), stands for a contrary proposition because the case acknowledges that a grand jury inquiry can go forward without a recommendation from the Internal Revenue Service to the Department of Justice. We note, in addition, that many cases refuse to dismiss indictments based on challenges involving a federal agency's failure to adhere to its own guidelines. *United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir.1980); *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.1978) (per curiam); *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140. Finally, we note that defendant's challenge to the use of his tax returns in procuring his indictment resembles the type of evidentiary challenge to grand jury procedures foreclosed by the Supreme Court in *United States v. Costello*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), and its progeny.

an indictment against him. The third grand jury, impaneled in Reno, Nevada, returned the indictment involved in this appeal.

In *United States v. Thompson,* 251 U.S. 407, 413–14, 40 S.Ct. 289, 291–92, 64 L.Ed. 333 (1920), the Supreme Court accepted the Government's contention that a grand jury's power is continuous and that adverse action or failure to act by a previous grand jury does not limit or exhaust a successor grand jury's power to investigate. Rule 6(e)(3)(C)(iii) of the Federal Rules of Criminal Procedure furthermore authorizes transfer of one grand jury's material to another grand jury without court order. FED.R.CRIM.P. 6(e)(3)(C)(iii). The Rule thus contemplates that successive grand juries may investigate the same or similar crimes. Consequently, this court holds that the prosecution's presentation of evidence to three grand juries in this case violated no procedural rule or judicially-imposed limits on a grand jury's investigatory role.

The presentation of evidence to three grand juries additionally did not violate the Supreme Court's decision in *Petite,* 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960). In *Petite,* the Supreme Court granted the *Government's* motion to dismiss a federal indictment returned by a grand jury in violation of a Department of Justice policy forbidding successive state and federal prosecutions for the same crime. *Id.* at 530, 80 S.Ct. at 451. In *Petite,* the Supreme Court did not forbid, or even criticize the *investigation* of one crime by successive grand juries. In this case, although three grand juries investigated defendant's course of conduct, only one grand jury returned an indictment against him. The Government's presentation of evidence to these grand juries thus violated neither the letter nor the spirit of *Petite.*

[17] Moreover, even if the Government's presentation of evidence to three grand juries could be considered to have violated the Supreme Court's decision in *Petite,* a *Petite* violation does not compel dismissal of an indictment. *United States v. Garner,* 632 F.2d 758, 761 (9th Cir.1980), *cert. denied,* 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981); *United States v. Smith,* 595 F.2d 1176, 1181 (9th Cir.1979); *United States v. Snell,* 592 F.2d 1083, 1087 (9th Cir.1979), *cert. denied,* 442 U.S. 944, 99 S.Ct. 2889, 61 L.Ed.2d 315. As a result, this court would not order dismissal of the indictment returned against defendant even if the facts of this case presented a violation of *Petite.*

4. *Employment of grand jury agents*

[18] Finally, defendant contends that this court must order dismissal of the indictment because the prosecution employed the service of certain "grand jury agents" in investigating this case, and thereby overrode the independence of the grand jury. We note that the foreman of the two Portland grand juries administered an oath to one Internal Revenue Service agent and four Federal Bureau of Investigation agents, to the effect that the agents would report back to the grand jury the findings of their investigations and return to the grand jury any documents of which the grand jury should be made aware. The grand jury agents served subpoenas duces tecum upon various persons, which informed those persons that they could deliver the subpoenaed documents either to the grand jury agents or to the grand jury itself. The grand jury agents additionally examined the subpoenaed documents and discussed among themselves the relevance of the subpoenaed documents to the investigation. One grand jury agent, shortly before his swearing-in, informed the recipient of such a subpoena that the grand jury would swear him in as its agent in the near future. This agent later testified at length before the indicting grand jury in Reno.

The various cases addressing the propriety of employment of grand jury agents recognize that the Federal Rules of Criminal Procedure do not authorize such grand jury personnel. *See United States v. Kilpatrick,* 594 F.Supp. 1324, 1344 (D.Colo. 1984), *appeal docketed,* No. 84–2481 (10th Cir. Oct. 24, 1984). These cases analyze the employment of grand jury agents as a problem of unauthorized disclosure of grand jury material or as a problem of unauthorized presence during grand jury deliberations. *Id.* at 1329–30; *United States v. Carcaise*, 442 F.Supp. 1209, 1210 (M.D.Fla.1978). Both problems present violations of Rule 6 of the Federal Rules of Criminal Procedure. FED.R.CRIM.P. 6(d) (setting forth who may be present during grand jury deliberations); FED.R.CRIM.P. 6(e) (setting forth the circumstances under which, and to whom, disclosure of grand jury materials is proper). The cases acknowledge, however, that the danger arising from the employment of grand jury agents derives from the risk that such agents will override the independence of the grand jury, whether the employment of such agents is classified as an unauthorized presence or as an unauthorized disclosure. As the court noted in *United States v. Anderson*, 577 F.Supp. 223 (D.Wyo. 1983), *appeal docketed*, No. 83–2519 (10th Cir. Nov. 17, 1983) (argued April 18, 1985):

> The most important function of a grand jury is to stand between prosecuting authorities and the suspect as an unbiased valuator of evidence. That function cannot be maintained or understood by society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury.... A grand jury that has become identified in the eyes of lay witnesses before it with law enforcement agents is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing its constitutional function to check the power of the government.

Id. at 232.

Only two cases, to our knowledge, have ordered dismissal of an indictment due to the employment of grand jury agents. *United States v. Kilpatrick*, 594 F.Supp. at 1353 (D.Colo.1984) (*appeal docketed* as previously noted); *United States v. Anderson*, 577 F.Supp. at 234 (D.Wyo.1983) (*appeal docketed* as previously noted). These cases, decided by the same district judge, involved conduct of a substantially more egregious nature than that alleged here. In *Kilpatrick*, for example, the prosecutor and not the foreman of the grand jury administered oaths to the agents. 594 F.Supp. at 1328. In addition, the agents appeared together as witnesses before the grand jury, outside the presence of Government counsel. *Id.* at 1330. Moreover, the court believed that the agents had remained present during an important colloquy between the prosecutor and the grand jurors. *Id.* Finally, the court suggested that the grand jury agents in fact were using their access to grand jury materials to further civil enforcement purposes of the Internal Revenue Service. *Id.* at 1331. In *Anderson*, the grand jury agents informed recipients of grand jury subpoenas that they were agents of the grand jury. 577 F.Supp. at 232. In addition, one grand jury agent informally granted immunity to a grand jury witness. *Id.*

In this case, only one grand jury agent revealed his (future) status as a grand jury agent to one recipient of a grand jury subpoena. No grand jury agent sought to immunize the testimony of grand jury witnesses from future prosecution. Moreover, the trial court gave no indication that it thought the grand jury agents were misusing their access to grand jury materials for civil enforcement purposes. Under these circumstances, this court finds the use of grand jury agents in this case similar to the use of postal employees in *United States v. Carcaise*, 442 F.Supp. at 1212, which was to gather and summarize grand jury evidence. Like the court in *Carcaise*, *id.*, this court holds that the employment of grand jury agents does not justify dismissal of the indictment.

[19] We note, in addition, that Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) authorizes disclosure of grand jury materials to federal officials such as the Federal Bureau of Investigation and Internal Revenue Service agents who assisted the prosecution in collecting evidence for the grand jury in this case. FED.R.CRIM.P. 6(e)(3)(A)(ii). *See also In re Gruberg*, 453

F.Supp. 1225, 1233–34 (S.D.N.Y.1978). We furthermore observe that the prosecution disclosed the names of these agents to the district court. *See* Fed.R.Crim.P. 6(e)(3)(B). Because the district court, after a hearing, did not believe that these agents sought access to the grand jury's materials for purely civil purposes, and because the record itself suggests no such intention, disclosure to the agents was proper under Rule 6(e)(3)(A)(ii) and did not require a court order pursuant to Rule 6(e)(3)(C). *See generally United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). We note that the legislative history to Rule 6(e)(3)(C)(iii) suggests an assumption on the part of Congress that FBI and IRS agents would perform investigatory functions preceding grand jury indictments. S.REP. NO. 95-354, 95th Cong., 1st Sess. 6, *reprinted in* 1977 U.S.CODE CONG. & AD.NEWS 527, 530. As a result, the five FBI and IRS agents in this case properly gained access to the grand jury's material.

We find no indication in the record that any one of the five grand jury agents remained present during the grand jury's consideration of unrelated evidence or during colloquies between the prosecutor and the grand jury. Thus the record suggests no unauthorized presence violation of Rule 6(d). FED.R.CRIM.P. 6(d). The one grand jury agent who appeared as a grand jury witness properly was present before the grand jury under the terms of the Rule.

Under the circumstances of this case, we find that the employment of grand jury agents did not override the independence of the grand jury. We observe, however, that the assistance of such federal employees, though essential to the progress of many complex or controversial investigations, may raise the possibility of claims of error unnecessarily.

C. *Sufficiency of the Evidence*

Defendant's third contention challenges the sufficiency of the Government's evidence to support the jury's guilty verdicts on Counts V and VI. Counts V and VI charged that defendant willfully subscribed, under penalties of perjury, his 1979 and 1980 tax returns even though defendant did not believe the returns to be true and correct in material matters. 26 U.S.C. § 7206(1) (1967). Specifically, Counts V and VI charged that defendant grossly underreported, in his 1979 and 1980 tax returns, the amount of legal fees he received from his prior law firm for work he had performed before becoming a judge. The Government contends that defendant received approximately $41,000 in fee income in the 1979 tax year although defendant's 1979 tax return reported that he had only received approximately $22,000 in fee income that year. The Government furthermore contends that defendant received approximately $88,000 in fee income during the 1980 tax year although defendant's 1980 return reported no fee income. Defendant maintains that the fee income which he received during the 1980 tax year was included in a $150,000 figure representing the sale price of defendant's interest in his prior law firm. The 1980 return reported the $150,000 sale price in a Schedule D in which defendant claimed a $100,000 capital loss on the sale of his interest in the firm. Defendant later conceded that the 1980 return inappropriately characterized his fee income during that year as a capital gain.

The Government proffered substantial evidence to support its claim that defendant had willfully underreported his fee income in the 1979 and 1980 returns. The Government submitted, for example, duplicates of checks sent to defendant from attorneys working for his prior law firm, representing the fee income that defendant had earned before becoming a judge. The Government also submitted various bank records setting forth amounts that defendant deposited in his personal account after he received the fee income checks. Both parties agree that defendant did not deposit all of the checks but, rather, cashed several of the checks at neighborhood casinos. The Government's evidence suggested that defendant reported on his 1979 and 1980 tax returns all checks which he deposited, but failed to report any of the checks which he cashed at casinos.

The Government furthermore offered in evidence correspondence between defendant and Joseph Wright, the accountant who prepared defendant's 1979 tax return. This correspondence demonstrated that defendant supplied Wright with an estimate of his 1979 fee income which understated defendant's actual fee income by approximately $19,000. Other documentary evidence submitted by the Government demonstrated that Wright relied on this estimate in preparing defendant's 1979 tax return and in disclosing defendant's financial status to a lender from whom defendant was seeking a mortgage.

With respect to defendant's 1980 return, the Government offered as evidence defendant's sudden firing of Wright after thirty years of service and hiring of Jerry Watson, head of Creative Tax Planning. Watson prepared defendant's 1980 return, for which defendant paid Watson $2,000, as compared to the $600 fee he had paid Wright. The Government also submitted defendant's request for an extension of time to file his 1980 return, which defendant prepared himself, in which defendant estimated his tax liability would exceed $42,000. The 1980 return, however, claimed a refund in excess of $44,000. Watson completed the 1980 return in pencil, and left erratic marks in the margin of the return and elsewhere. Defendant's counsel conceded at oral argument that the return cried out for an audit.

Defendant did not seek to rebut all of the evidence offered by the Government to prove that defendant willfully understated his 1979 and 1980 taxable income. Rather, defendant, while testifying at trial, consistently asserted that the understatements were not willful because he relied in good faith on the expertise of Wright and Watson when he signed his 1979 and 1980 returns. Defendant maintains that he made full disclosure to Wright and to Watson of all income he received during these years, and that he justifiably relied on their tax advice when he signed the returns which they had prepared for him. A major dispute between the parties at trial centered around a letter allegedly delivered personally by defendant's secretary to Wright in which defendant claims to have disclosed accurately his 1979 fee income. Defendant's secretary, Judy Ahlstrom, testified that she delivered the letter to Wright's office. Wright testified at trial that he did not receive the letter and that he never lost documents from his clients.

With respect to his 1980 return, defendant contends that his sudden hiring of Jerry Watson does not indicate an intent to understate his fee income, but simply a lawful desire to change accountants. Defendant asserts that the fee paid to Watson was not unreasonably high, but rather that the fee charged by Wright was unreasonably low. Defendant maintains that he innocently relied on Watson's ability to prepare correctly his 1980 return, and, because defendant was generally ignorant of the niceties of the tax law, he had no reason to doubt its accuracy. All of this, defendant contends, proves a lack of willfullness on his part in subscribing his name to the 1980 return.

There is no claim, however, that Judge Hoffman erred in charging the jury. Therefore we have only to decide whether the Government presented enough evidence from which a jury rationally could have concluded that Claiborne willfully filed false income tax returns. We regard the Government's evidence as ample.

[20-23] Proof of willfulness is essential to support a conviction under section 7206(1). *United States v. Bishop*, 412 U.S. 346, 361, 93 S.Ct. 2008, 2017, 36 L.Ed.2d 941 (1973); *United States v. Pallan*, 571 F.2d 497, 501 (9th Cir.1978). To prove willfulness, the Government must show that defendant intended to violate the law or knew that his actions would do so. *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed.2d 12 (1976) (per curiam). The cases make clear that neither a careless disregard whether one's actions violate the law nor gross negligence in signing a tax return will suffice. *United*

States v. Loney, 719 F.2d 1435, 1436 (9th Cir.1983). The Government, however, may base its proof of willfulness on circumstantial evidence indicating that defendant knew or must have known that his returns were false. *Black v. United States*, 309 F.2d 331, 342 (8th Cir.1962) (inferring willfulness from any conduct the likely effect of which is to mislead or conceal).

[24] In addition, a defendant may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information. *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir.1968), *cert. denied*, 409 U.S. 843, 93 S.Ct. 44, 34 L.Ed.2d 83 (1972). As the Seventh Circuit recently observed in *United States v. Whyte*, 699 F.2d 375 (7th Cir.1983):

> It is a valid defense to a charge of filing a false return if a defendant provides full information regarding his taxable income and expenses to an accountant qualified to prepare federal tax returns, and ... the defendant adopts and files the return as prepared without having reason to believe it is incorrect.

Id. at 379.

On the other hand, a defendant cannot shift his responsibility for deficiencies to an accountant if the defendant has withheld vital information or has taken steps to mislead his accountant. *United States v. Garavaglia*, 566 F.2d 1056, 1060 (6th Cir. 1977); *Bender v. Commissioner*, 256 F.2d 771, 774 (7th Cir.1958).

[25, 26] In the case of Claiborne's 1979 tax return, the parties hotly disputed whether defendant made full disclosure of his 1979 fee income to Joseph Wright. As we have noted, defendant claims that he made full disclosure in a letter delivered by his secretary to Wright's office. Wright, on the other hand, testified that he received no such letter. The resolution of that factual dispute was of course for the jury and we see no basis to question its determination to credit Wright's testimony over that of Claiborne and his secretary. Because we must draw all reasonable inferences from the evidence in favor of the Government, we cannot find that the jury incorrectly disregarded defendant's reliance defense. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 57 L.Ed.2d 1 (1979); *United States v. Beecroft*, 608 F.2d 753, 756 (9th Cir.1979); *Cosby v. Jones*, 682 F.2d 1373, 1382 (11th Cir.1982). We observe, in addition, that the jury, in viewing the Government's evidence that defendant incorrectly stated his 1979 fee income in a different letter to Wright and the Government's evidence that defendant failed to report any checks cashed at casinos, may have decided that defendant deliberately sought to mislead Wright and therefore was not entitled to invoke the reliance defense. *United States v. Scher*, 476 F.2d 319, 321 (7th Cir.1973). We observe that the amounts of the checks defendant cashed at casinos were large (in one instance as large as $3,000), appearing to be more than mere pocket money. We therefore determine, after reviewing evidence, that a rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789; *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978).

[27] We base our conclusion with respect to the 1980 return on similar grounds. Here, the crucial issue before the jury was not whether defendant made full disclosure to Jerry Watson, but rather whether he relied in good faith on Watson's advice. Defendant's own understanding of tax issues is highly relevant to the question of his good faith reliance on Jerry Watson. *See United States v. Whyte*, 699 F.2d at 380. The parties agree that defendant presided as district court judge over some tax law disputes. Nevertheless, defendant consistently has maintained that he is not a tax expert and has had no significant experience with the distinction between ordinary income and capital gain.

The jury obviously did not believe defendant and found his claims of ignorance to be disingenuous. The support for that conclusion is strong. We assume that defendant gained some familiarity with concepts as basic to the tax law as the distinction between ordinary income and capital gain during his law school studies, his thirty odd years of practicing law, and his three years on the bench before filing the 1980 return. *Compare Lurding v. United States*, 179 F.2d 419, 420 (6th Cir.1950) (where defendant was uneducated and unfamiliar with taxes, bookkeeping and accounting). We note that defendant reported his fee income as ordinary income in all years previous to 1980, when he reported the income as a capital gain. We observe, in addition, that defendant reviewed the 1980 return for ten or fifteen minutes before signing his name to it. During this time, defendant must have seen, at the least, that Watson had completed the return erratically, and in pencil. Defendant most likely also observed at this time that Watson's return reported no fee income.

[28] In reviewing the jury's decision to convict, we must draw all reasonable inferences from the evidence in favor of the Government. *United States v. Spetz*, 721 F.2d 1457, 1477 (9th Cir.1983). On this record, we have no trouble concluding that a rational trier of fact could have found defendant guilty of Count V and Count VI beyond a reasonable doubt. *See United States v. Des Jardins*, 747 F.2d 499, 507 (9th Cir.1984).

D. Trial Errors

Defendant's final contentions on appeal relate to various alleged errors made by the district court prior to and during defendant's second trial. Four of these alleged errors merit discussion.

1. *Failure to excuse for cause two prospective jurors*

First, defendant asserts that the district court's refusal to excuse for cause two prospective members of the jury unconstitutionally forced him to exercise two of his allotted peremptory challenges, all of which he eventually exhausted, thereby forfeiting his right to exercise those challenges against two other veniremen and impairing his Sixth Amendment right to an impartial jury. *See United States v. Martin*, 749 F.2d 1514, 1518 (11th Cir.1985). Defendant contends that these two prospective jurors exhibited actual bias towards him and thus the district court should have granted his motions to excuse them from jury service for cause. Defendant also claims that the district judge asked these two prospective jurors leading questions, which did not elicit objectively whether the jurors could decide the case without bias or prejudice. We disagree with this characterization of the judge's colloquies with the jurors and find that the judge fairly gave them the opportunity to reveal, without embarrassment, any bias or prejudice which they felt against defendant.

[29] Defendant does not contend, however, that the jury which convicted him was biased. Rather, his objection to the district court's failure to exclude the two prospective jurors rests on the theory that it is constitutionally impermissible to force defendants to exhaust their peremptory challenges on persons who should be excused for cause. *See United States v. Daly*, 716 F.2d 1499, 1507 (9th Cir.1983), *cert. dismissed*, — U.S. —, 104 S.Ct. 1456, 79 L.Ed.2d 773 (1984); *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). We agree, and reaffirm that the peremptory challenge is an important safeguard of a defendant's Sixth Amendment right to an impartial trial. *See Hines v. Enomoto*, 658 F.2d 667, 672 (9th Cir.1981); *United States v. Giacalone*, 588 F.2d 1158, 1164 (6th Cir.1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1045 (1979). *See also Rosales-Lopez v. United States*, 451 U.S. 182, 188 n. 6, 101 S.Ct. 1629, 1634 n. 6, 68 L.Ed.2d 22 (1981); *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965).

[30] Even though this court agrees that forcing a defendant to expend peremptory strikes may implicate the Sixth Amendment, *Celestine v. Blackburn*, 750 F.2d 353, 360 (5th Cir.1984), a constitutional problem only arises in cases where a prospective juror upon whom defendant spent a peremptory challenge was actually biased and therefore should have been excluded by the trial judge. *United States v. Allsup*, 566 F.2d at 71. That is not the case here. One prospective juror, Robert Whitten, indicated during voir dire that he had a preconception of defendant's guilt or innocence and that defendant would have to come forward with evidence to overcome this preconception. The trial judge then instructed Whitten that a criminal defendant enjoyed a constitutional presumption of innocence and made clear to Whitten that defendant did not have to come forward with proof of innocence but rather the prosecution had to come forward with proof of defendant's guilt beyond a reasonable doubt. Whitten subsequently indicated that he would decide defendant's guilt or innocence impartially, on the evidence presented at trial and according to the law charged by the court.

A second prospective juror, Susan Varnum, indicated during voir dire that she did not like defendant's appearance and admitted that she had formed an opinion on defendant's guilt or innocence as a result of the media coverage of defendant's case. Varnum also indicated, however, that she did not believe in trying cases through the newspapers and that defendant would not have a burden to overcome due to her personal attitude towards his appearance. Varnum furthermore expressed to the trial court that she was willing and able to judge the evidence in the case in an impartial manner.

[31] Under these circumstances, we cannot find that the district court committed a manifest error or an abuse of its broad discretion in failing to excuse for cause jurors Whitten and Varnum. *Celestine v. Blackburn*, 750 F.2d at 360; *United States v. Giacalone*, 588 F.2d at 1164. Few aspects of a jury trial are more committed to a district court's discretion than the decision whether to excuse a prospective juror for actual bias. *United States v. Gullion*, 575 F.2d 26, 29 (1st Cir.1978). Moreover, trial courts possess a peculiar ability to determine whether a prospective juror's claimed ability to decide a case impartially is genuine. *Patton v. Yount*, — U.S. ——, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984). A prospective juror's statement that he has some impression about the case or a party is a frank and honest answer to the court's inquiry, and the juror's statement that he can lay aside his impressions and decide the case on the evidence presented and the charge of the court should also be weighed in the discretion of the trial judge.

Here, the district court determined, based on the prospective jurors' responses, that Whitten and Varnum would weigh the evidence in the case impartially despite their initial preconceptions of defendant's guilt or innocence. We do not find this decision an abuse of the district court's discretion. Indeed, the fact that defendant took advantage of his peremptory challenges to strike Whitten and Varnum may reflect "not a denial of justice," but a proper utilization of the peremptory tool. *United States v. Giacalone*, 588 F.2d at 1164.

2. *Failure to order disclosure of Jencks Act statements*

Second, defendant contends that the district court committed reversible error because the court erroneously declined to provide the defense, pursuant to the terms of the Jencks Act, 18 U.S.C. § 3500 (1985), certain "302" summaries of FBI interviews with a key Government witness, concluding that the summaries did not contain material subject to disclosure under the Act. Specifically, defendant maintains that the district court improperly refused to disclose statements made by Joseph Wright to FBI agents during interviews with Wright prior to trial. Defendant contends that these statements would have impeached Wright's trial testimony and, because Wright's testimony materially affected the jury's decision to convict him, that the court's refusal to disclose these statements prejudicially affected defendant's substantial rights.

One such statement suggested that Wright had misplaced or destroyed pre-

1976 records during his move to a new office. Wright testified that he did not lose or misplace any records pertaining to defendant. Defendant maintains that Wright's loss of pre-1976 records may have suggested to the jury the possibility that Wright mistakenly included a letter written by defendant to Wright in 1980 in the records that Wright lost or destroyed before he moved to new quarters. Other statements included a reference by Wright to a Mr. Swanson, who helped Wright in his accounting business, a statement by Wright that he did not "cross-examine" his clients, and a statement by Wright that his work for defendant decreased when defendant became a judge. The trial court refused to order disclosure of this material on the ground that the summaries containing this material were not in fact "statements" by witness Wright.

In reviewing the district court's refusal to disclose the 302 forms to defendant, this court must ponder two questions. First, we must consider whether the 302 forms included "statements" of witness Wright within the meaning of the Jencks Act. Second, we must consider whether, assuming the 302 forms did contain such statements, the district court's refusal to order their disclosure prejudicially affected defendant's substantial rights. *United States v. Long*, 715 F.2d 1364, 1368 (9th Cir.1983).

[32] The Jencks Act restrictively defines those "statements" by a witness which are subject to disclosure. Specifically, the Act provides:

> The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—
>
> (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e) (1985). The 302 summaries of interviews conducted by Government agents with witness Wright cannot fall within subsection (1) of 18 U.S.C. § 3500(e) because Wright did not draft the summaries or otherwise approve their contents. *Compare Goldberg v. United States*, 425 U.S. 94, 103, 96 S.Ct. 1338, 1344, 47 L.Ed.2d 603 (1976). Indeed, the record is bereft of evidence to suggest that Wright saw the 302 forms at all. Similarly, the 302 summaries cannot fall within subsection (3) of 18 U.S.C. § 3500(e) because Wright did not make any "statements" contained therein to a grand jury. 18 U.S.C. § 3500(e)(3) (1985).

[33] Furthermore, this court finds that the 302 summaries do not fall within subsection (2) of 18 U.S.C. § 3500(e) because the summaries do not purport to transcribe in a substantially verbatim fashion Wright's various interviews with Government agents. Rather, the summaries represent, in our view, the *agents'* selection of certain information conveyed by Wright for possible use in the Government's case against defendant. *See Palermo v. United States*, 360 U.S. 343, 355 n. 12, 79 S.Ct. 1217, 1226 n. 12, 3 L.Ed.2d 1287 (1959) (characterizing an agent's 600 word summary of a 3½ hour conference with a Government witness as the agent's selection of items deemed appropriate for inclusion rather than a virtually verbatim narrative of what the witness said). *Accord United States v. Bernard*, 625 F.2d 854, 859 (9th Cir.1980); *United States v. Edwards*, 702 F.2d 529, 531 (5th Cir.1983); *United States v. Durham*, 587 F.2d 799, 802 (5th Cir.1979). The summaries additionally fail to satisfy the requirements of 18 U.S.C. § 3500(e)(2) because the agents did not draft them contemporaneously with Wright's responses during the interviews. 18 U.S.C. § 3500(e)(2) (1985). We believe that the district court properly characterized the summaries as non-Jencks Act material and, therefore, correctly declined to disclose their contents to defendant. Under these circumstances, we cannot find, as we must to overturn a district court's Jencks Act decision, that the district court's characterization was clearly erroneous, *United States v. Hodges*, 556 F.2d 366, 368 (5th Cir.1977), *cert. denied*, 434 U.S. 1016, 98 S.Ct. 735, 54 L.Ed.2d 762 (1978), or an abuse of discretion, *Government of Virgin Islands v. Lovell*, 410 F.2d 307, 310 (3d Cir.1969), *cert. denied*, 396 U.S. 964, 90 S.Ct. 440, 24 L.Ed.2d 428.

[34] Moreover, even if the district court's refusal to disclose the summaries to defendant was clearly erroneous or an abuse of discretion, we do not believe that the district court's decision prejudicially affected defendant's substantial rights. *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir.1975). The only information contained in the summaries that could be damaging to Wright's credibility, and therefore helpful to the defense, is Wright's admission that he lost or mislaid some records during his move to a new office.[4] The record demonstrates, however, that defendant did cross-examine Wright with respect to this loss of records at defendant's first trial. Thus, defendant had knowledge of the loss and made use of that knowledge without access to the summaries. Under these circumstances, the court's refusal to disclose the summaries to defendant did not prejudice defendant's substantial rights. *Government of Virgin Islands v. Lovell*, 410 F.2d at 311. *See also United States v. Johnson*, 521 F.2d at 1320.

3. *The prosecution's failure to disclose Brady material*

[35] Third, defendant contends that the prosecution's failure, following defendant's request to deliver these 302 summaries of interviews between Government agents and Wright deprived defendant of a fair trial under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Prior to trial, defendant requested from the Government any statements in its possession which would tend to impeach the credibility of any Government witness, including but not limited to statements contradicting other statements by such persons. Defendant asserts that the 302 summaries contained such impeachment evidence, because the summaries suggested, among other things, that Wright may have misplaced important correspondence that he had received from defendant. Wright testified at trial that he never lost records pertaining to defendant. Defendant contends that the prosecution's failure to disclose this material might have affected the jury's verdict and consequently demands a new trial.

The Supreme Court's decision in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), provides the framework for our analysis of the prosecution's failure to disclose this impeachment evidence. In *Agurs*, the Supreme Court reaffirmed its holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), that due process requires a prosecutor to disclose material exculpatory information in its possession to the defense. *Id.* at 105–06, 96 S.Ct. at 2398–99. The Supreme Court announced different "materiality" tests, however, according to the specificity of a defendant's request for information. *Id.* at 106, 112, 96 S.Ct. at 2398–2401. If a defendant made a specific request for exculpatory information, which gave the prosecution notice of exactly what the defendant desired, undisclosed exculpatory information would be material if it might have affected the outcome of defendant's trial. *Id.* at 106, 96 S.Ct. at 2398. On the other hand, if a defendant made either a general request for exculpatory information or made no request, the undisclosed exculpatory information would not be material unless it created a reasonable doubt that did not otherwise exist. *Id.* at 112, 96 S.Ct. at 2401.

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[4] Ordinarily, the Jencks Act discourages courts from speculating on what use defendants would make of witness statements. *United States v. Bibbero*, 749 F.2d 581, 585 (9th Cir.1984). In the case before us, however, defendant concedes that he would have used the information relating to Wright's loss of pre-1976 records to impeach Wright's testimony that he never lost records pertaining to defendant.

Defendant's request for information in the Government's possession which would tend to impeach the credibility of any Government witness was a general and not a specific request. *See United States v. Shelton,* 588 F.2d 1242, 1249 n. 10 (9th Cir.1978) (characterizing a request for everything tending to impeach the credibility of an *identified* witness as a general request) *cert. denied,* 442 U.S. 909, 99 S.Ct. 2822, 61 L.Ed.2d 275 (1979); *Ostrer v. United States,* 577 F.2d 782, 786 (2d Cir. 1978) (characterizing a request for material useful to cross-examine an *identified* witness with respect to bias as a general request) *cert. denied,* 439 U.S. 1115, 99 S.Ct. 1018, 59 L.Ed.2d 73 (1979); *United States v. DiCarlo,* 575 F.2d 952, 959 (1st Cir.1978) (characterizing a request for all evidence favorable to defendant, including impeachment evidence, as a general request) *cert. denied,* 439 U.S. 834, 99 S.Ct. 115, 58 L.Ed.2d 129. We note that defendant's request did not focus on a particular witness, *United States v. Mackey,* 571 F.2d 376, 389 (7th Cir.1978), or on particular sources of witness statements, such as 302 forms. *Compare United States v. Warhop,* 732 F.2d 775, 778 (10th Cir.1984). Under these circumstances, we find that defendant's request did not give the prosecution notice of exactly what information defendant desired. *United States v. Agurs,* 427 U.S. at 106, 96 S.Ct. at 2398.

Because defendant's request was general and not specific, the prosecution's failure to disclose the impeachment evidence contained in the 302 summaries will only justify a new trial if the evidence would have created a reasonable doubt that did not otherwise exist. *United States v. Agurs, Id.* 427 U.S. at 112, 96 S.Ct. at 2401. *See also United States v. Lasky,* 548 F.2d 835, 839 (9th Cir.1977) (per curiam), *cert. denied,* 434 U.S. 821, 98 S.Ct. 63, 54 L.Ed.2d 77. Under the circumstances of this case, we find that disclosure of the evidence would have created no such doubt. We acknowledge, of course, that credibility evidence can be material. *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). We acknowledge, in addition, that nondisclosure which impairs a defendant's ability effectively to cross-examine key witnesses may threaten to deprive a defendant of a fair trial. *Bagley v. Lumpkin,* 719 F.2d 1462, 1464 (9th Cir. 1983), *reversed on other grounds,* — U.S. —, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Nevertheless, we find that the prosecution's failure to disclose the 302 summaries in this case did not impair defendant's ability to cross-examine Wright effectively because defendant in fact had access to the most damaging impeachment evidence contained in the summaries and used this evidence to impeach Wright's credibility at the first trial. *Cf. United States v. Peters,* 732 F.2d 1004, 1009 (1st Cir.1984). Accordingly, the prosecution's disclosure of the impeachment evidence contained in the summaries would have told defendant nothing of importance that he did not know already. *United States v. Truong Dinh Hung,* 667 F.2d 1105, 1107 (4th Cir.1981) (per curiam), *cert. denied,* 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982). Under these circumstances, we cannot find that the prosecution's failure to turn over the 302 summaries to defendant deprived defendant of a fair trial. *Cf. United States v. Prior,* 546 F.2d 1254, 1259 (5th Cir.1977).

Indeed, we would reach the same conclusion even if we construed defendant's request for impeachment evidence as a specific request, as one decision from this circuit advises us to do. *United States v. Goldberg,* 582 F.2d 483, 489 (9th Cir.1978), *cert. denied,* 440 U.S. 973, 99 S.Ct. 1538, 59 L.Ed.2d 790 (1979). Because the impeachment evidence was duplicative of information that defendant possessed prior to his second trial, we cannot find that the prosecution's failure to disclose the impeachment evidence was "material" to defendant's conviction under either standard enunciated in *Agurs. United States v. Agurs,* 427 U.S. at 106, 112, 96 S.Ct. at 2398, 2401. As a result, we hold that the district court correctly determined that any failure to disclose which occurred in this case did not justify a new trial.

4. *Improper sequestration of a defense witness*

[36] Finally, defendant contends that the district court committed an abuse of discretion by improperly sequestering defense witness Judy Ahlstrom during a brief recess in the middle of her testimony concerning her alleged delivery to Wright of a letter from Claiborne disclosing the full extent of his 1979 fee income. As we indicated previously, Ahlstrom was, and apparently still is, defendant's secretary of many years. Defendant asserts that the trial judge prevented defense counsel from calming Ahlstrom during this recess, even though Ahlstrom had become visibly upset during her previous testimony. Because Ahlstrom's testimony, and her credibility, were crucial to defendant's case, defendant maintains that the trial court's refusal to allow defense counsel to calm her during this recess prejudicially affected the outcome of defendant's trial. We are not unmindful of the fact that this was the only instance of witness sequestration during defendant's trial. We are not persuaded, however, given the circumstances of this case, and Ahlstrom's obvious problems during her testimony, that her sequestration amounted to reversible error.

The record does not disclose why the trial judge ordered a recess, although it does reflect the court's determination that a recess at that particular time was an urgent necessity. This court will not engage in speculation as to the trial court's motives. Rather, we note the broad discretion enjoyed by a trial judge with respect to the mode of interrogating witnesses and presenting evidence, FED.R.EVID. 611(a), and emphasize that this discretion includes the ability to order a recess as circumstances necessitate. This broad discretion over the mechanics of a trial furthermore includes the ability to order sequestration of a witness. *See Geders v. United States,* 425 U.S. 80, 87, 96 S.Ct. 1330, 1334, 47 L.Ed.2d 592 (1976). In *Geders,* The Supreme Court observed:

> Our cases have consistently recognized the important role the trial judge plays in the federal system of criminal justice. The judge is not a mere moderator but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. A criminal trial does not unfold like a play with actors following a script; there is no scenario and can be none. The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process.... The judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during and after their testimony.

Id. at 86–87, 96 S.Ct. at 1334–1335. The Court held, however, that this broad power to sequester a witness did not include the power to impair a *defendant* 's right to the effective assistance of counsel by ordering a defendant not to discuss his trial with his attorney during a significant recess. *Id.* at 91, 96 S.Ct. at 1336. *Accord United States v. Romano,* 736 F.2d 1432, 1435 (11th Cir. 1984). We note that the trial court's sequestration of witness Ahlstrom did not impinge upon defendant's Sixth Amendment right to the effective assistance of his counsel in this case. Thus, defendant's reliance upon cases precluding sequestration of *defendants* on Sixth Amendment grounds is misplaced.

Our research reveals only one case in which a court has held that sequestration of a non-party witness may constitute reversible error under *Geders. United States v. Romano,* 736 F.2d, at 1439. In that case, the Eleventh Circuit reversed a defendant's conviction because the trial court had prevented his co-defendant, whose testimony was crucial to the first defendant's case, from communicating with his attorney with respect to his own testimony during a recess which lasted several days. *Id.* The court limited its holding to the peculiar facts of the case, however, and remarked that its holding "by no means implie[d] that a co-defendant's conviction typically will be reversed on *Geders* grounds." *Id.*

We see no reason to extend the Eleventh Circuit's holding to the facts of this case. We note that the recess in this case was brief and that Ahlstrom resumed her testimony immediately after the recess ended. The trial judge apparently ordered Ahlstrom sequestered during the recess in order to prevent improper influences upon her testimony, a purpose endorsed by the Supreme Court in *Geders. Geders v. United States,* 425 U.S. at 87, 96 S.Ct. at 1334. Under the circumstances of this case, we find that the trial court's sequestration of Ahlstrom during a brief recess was a proper exercise of discretion.

III. CONCLUSION

This court holds, having considered all of the claimed errors meriting attention:

(1) that Articles I and III of the Constitution did not render defendant immune from prosecution,

(2) that the Government did not engage in unconstitutional abuse of the grand jury process,

(3) that the evidence presented at trial was sufficient to sustain defendant's conviction, and

(4) that various alleged trial errors do not mandate a new trial.

We have considered other errors advanced by defendant, explicitly or implicitly, including a suggestion that he was the victim of selective prosecution; that the trial judge improperly refused to consider the effect of the trial's publicity in the Nevada newspapers (some of which was unfavorable to the *Government*); the unusual extent to which the Government gave concessions to Conforte; the Government's treatment of an IRS agent who apparently did not favor an investigation of defendant; and grand jury investigations of other persons associated with defendant. Because we find on the record an insufficient basis to justify reversal of defendant's conviction on these and other grounds, this court accordingly AFFIRMS the judgment of conviction on Counts V and VI.

UNITED STATES
v.
CLAIBORNE.
No. 84-1294.

United States Court of Appeals,
Ninth Circuit.

Dec. 30, 1985.

FERGUSON, Circuit Judge, dissenting from the order denying hearing *en banc.*

The refusal of the court to rehear this case *en banc* is lamentable. When the prosecution withholds vital exculpatory information, justice is denied. Rehearing *en banc* is necessary to correct the substantial curtailment of a defendant's right to discover impeachment material pursuant to the Jencks Act, 18 U.S.C. § 3500, and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Defense access to exculpatory or impeachment evidence within the government's possession is a vital constitutional and statutory right. *See Brady,* 373 U.S. at 87, 83 S.Ct. at 1196; *United States v. Polizzi,* 500 F.2d 856, 893 (9th Cir.1974) ("The prosecution is obligated to disclose to the defense statements falling within the Jencks Act regardless of anyone's perception of the utility of the statements for impeachment."), *cert. denied,* 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 820 (1975). Impeachment evidence plays a pivotal role in any trial, *see, e.g., Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974), and withholding impeachment evidence in this case denied the defendant an effective defense.

Claiborne, a United States district court judge, was convicted of income tax evasion. His accountant, Wright, was an important prosecution witness. At trial, Claiborne presented evidence that his secretary delivered a letter to Wright revising the amount of his income. Wright testified that he had no recollection of receiving the letter and further that he never lost client files.

Thus, Claiborne's conviction hinged on Wright's credibility. Regrettably, the government and the trial judge failed to furnish Claiborne during the trial with damaging pretrial statements made by Wright.

Government agents' summaries of pretrial interviews with Wright indicate that he admitted to them that a substantial number of his client's files had been "thrown away." Despite a standing request under the Jencks Act and *Brady* for witnesses' pretrial statements, the defense learned of the summaries only after trial. At a posttrial hearing, the trial judge disclosed the existence of the summaries of the Wright interviews.

Although the judge reviewed some of the *in camera* material during trial, he examined none of the Wright material at that time. At the posttrial hearing, he reviewed some of the Wright material and concluded that none of it was Jencks Act or *Brady* impeachment material. Further, he failed to examine the remaining *in camera* material, some of which might have impeached Wright's testimony.

On appeal, the panel admitted that the Wright summaries were *Brady* impeachment evidence, but erroneously concluded that the failure to disclose the material was not prejudicial to the defense. *United States v. Claiborne,* 765 F.2d 784, 802–04 (9th Cir.1985). The panel's *Brady* analysis ignored *United States v. Bagley,* — U.S. —, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), announced six days before *Claiborne.* Under *Bagley,*

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 3384. The panel should have decided whether suppression of the Wright interview material "undermined confidence in the outcome of the trial." Instead, the panel employed a two part test: whether the evidence would have "created a reasonable doubt" or whether it "might have affected the outcome" of the trial. *Claiborne,* 765 F.2d at 802–03.

Ample evidence from the record supports the conclusion that suppression of the material undermines confidence in the trial outcome. Wright was a key witness in the government's case. Evidence that a significant number of his clients' files had been discarded, directly contradicting his earlier testimony, would certainly undermine his credibility sufficiently for the jury to conclude that the defendant had testified truthfully. Thus, Claiborne's conviction should have been reversed because the government withheld *Brady* impeachment evidence of one of its key witnesses.

Similarly, the panel's Jencks Act analysis was incorrect. The panel denied Claiborne access to the Wright summaries because they were not transcribed "in a substantially verbatim fashion" and the government agents did not draft them contemporaneously with Wright's interview. *Id.* at 801. After *Claiborne,* the government need only produce 18 U.S.C. § 3500(e)(1) statements actually read or drafted by the witness, and 18 U.S.C. § 3500(e)(2) statements drafted by an agent before the interview is over. This reasoning conflicts with *Campbell v. United States,* 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963), and significantly reduces a defendant's ability in this circuit to obtain witness statements taken by government agents.

Under *Campbell,* section 3500(e)(1) statements need not be signed or written by the witness, or even be a substantially verbatim recording of a prior statement. *Id.* at 492 n. 6, 83 S.Ct. at 1360 n. 6. The Court held that the FBI agent's recitation of the "substance" of his rough notes, which were "not a complete word-for-word transcription" of the interview, demonstrated sufficient adoption by the witness for purposes of the Jencks Act when the witness told the agent "he had got it straight." *Id.* at 489–90, 83 S.Ct. at 1359–60. The FBI agent wrote his report, based on rough notes and personal memory, seven hours after the witness interview. *Id.* at 490, 83

S.Ct. at 1359. The Court imposed no requirement or expectation that the agent draft a witness statement during an interview. Rather, *Campbell* recognized the informal and commonplace FBI practice of taking rough notes during an interview and later transcribing them into statements. This practice in *Campbell* made the witness statements no less susceptible to disclosure under the Jencks Act.

The fundamental error the panel committed was its failure to conduct an independent examination of the materials on which the trial court based its rulings. I fail to see how the panel, without looking at that material, could have fairly decided whether those rulings were erroneous. A reviewing court has an obligation to examine *Brady* and Jencks Act material to ensure that the district court's rulings were correct. *See Campbell*, 373 U.S. at 493, 83 S.Ct. at 1360. After the district court judge opened the *in camera* material at the posttrial hearing, he resealed the withheld documents. The documents have not been unsealed or read by anyone since the district court's posttrial hearing.

The *en banc* call in this case has been difficult for the judges of this circuit. It may be that hearing the case *en banc* and potentially reversing the conviction would be viewed by the public as defending one of our own rather than fairly applying the law. However, a defendant's right to a constitutionally fair trial cannot be balanced against the perception of others. Of course, we have an obligation to ensure that the circuit's actions are evenhanded and unbiased. But that duty is not jeopardized here. We must uphold our responsibility to remedy violations of constitutional rights, and I dissent from the court's refusal to hear this case *en banc*.

UNITED STATES
v.
CLAIBORNE.

No. 84–1294.

United States Court of Appeals,
Ninth Circuit.

Jan. 30, 1986.

REINHARDT, Circuit Judge, dissenting:

I respectfully dissent from the court's refusal to hear Judge Claiborne's appeal en banc.

This case is a most unusual one in a number of respects. It raises serious questions about the fair and impartial administration of justice.

I

BACKGROUND

United States District Judge Harry F. Claiborne was originally indicted and tried in the United States District Court on four counts involving his alleged acceptance of bribes in the performance of his official duties, two counts of tax evasion unrelated to the alleged bribes, and one count of filing a false financial statement with the Judicial Ethics Committee. The false filing count was also unrelated to the bribery charges. The first jury was unable to reach a verdict on any of the counts, and a mistrial was declared. The government then dropped the most serious charges—the allegations relating to bribery—and Judge Claiborne was retried only on the unrelated tax and false filing counts. The second jury acquitted him of filing a false financial statement, but convicted him on the tax charges.

Judge Claiborne was tried before an out-of-circuit senior district judge specially assigned to preside over his case. The district judge sentenced him to a two-year term of imprisonment. A specially selected panel composed of three judges from other circuits affirmed his conviction. 765 F.2d

784. Judge Claiborne petitioned for a rehearing and suggested a rehearing en banc. The special panel denied the petition for rehearing and recommended that we reject the suggestion for a rehearing en banc. An active member of this court then called for a vote by the full court on whether to rehear the appeal en banc. The full court has now voted, and decided not to grant Judge Claiborne a rehearing.[1]

Throughout these proceedings, Judge Claiborne has claimed that his investigation and prosecution constituted a part of an effort by the Department of Justice's Organized Crime Strike Force and the F.B.I. to discredit him personally and bring about his removal from the bench. Prior to his appointment in 1978, Judge Claiborne had been a prominent trial lawyer and had defended numerous individuals accused of committing criminal offenses. He contends that after his appointment the government launched a vendetta against him as a result of his issuance of a number of significant rulings adverse to the Department of Justice in criminal cases.

The Strike Force and the F.B.I. appear to have begun investigating Judge Claiborne in early 1980. According to Claiborne, in the Spring of 1980 he was investigated by a Las Vegas grand jury at the request of those agencies. The investigation related to Claiborne's actions as a criminal defense attorney, particularly with regard to whether Claiborne participated in illegal wiretapping activities. Apparently the investigation proved fruitless and the grand jury, after several months of hearings, failed to return an indictment against Judge Claiborne. However, a local law enforcement officer who had supplied evidence exculpating Judge Claiborne was demoted to a desk job and was himself investigated by the F.B.I.

On April 4, 1980 United States Marshals seized from the offices of the Strike Force a display satirizing Judge Claiborne and Chief Judge Foley. Claiborne's attorney had complained that the exhibit was intimidating and prejudicing members of the grand jury that was investigating the Judge, as well as witnesses who were testifying before the grand jury. At a subsequent hearing, Judge Foley described the display as "contemptuous" of the judicial process and the result of "gross misconduct."

Judge Claiborne alleges that the F.B.I.'s next step, taken in late 1980, was to launch another investigation of him on a different subject, and this time to open his mail. Judge Claiborne claims that when he unsealed an envelope he had received through the mail it contained not only the enclosure intended for him but also an enclosure sent to another individual, a person who was also a target of the then current F.B.I. investigation. According to Claiborne, that investigation concerned his sentencing of Gus Gallo, a convicted bookmaker, and resulted from the belief of some Justice Department officials that Gallo had not received a sufficiently severe sentence. The Gallo investigation also apparently came to nought.

Next, the government obtained statements from one Joseph Conforte that Judge Claiborne had solicited and accepted bribes from him. Based on Conforte's statements, the Strike Force, the F.B.I., and the Internal Revenue Service commenced still another investigation of Judge Claiborne. Conforte was the long-time owner of the Mustang Ranch brothel in Storey County, Nevada, a former client of Judge Claiborne's and a fugitive from justice. Conforte had been sentenced to 20 years in prison after being convicted of four counts of failing to withhold federal income taxes from the salaries of certain of his employees. According to newspaper articles contained in the court record, Conforte's first charge against Claiborne was that he had bribed him in connection with the Judge's adjudication of certain post-trial motions in Conforte's criminal case.

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[1] As is explained at p. 1330, *infra*, six out of 25 active judges recused themselves and did not participate in the vote.

That charge apparently collapsed when it was determined that Judge Claiborne had never presided over or ruled on any aspect of Conforte's case, and that the motions had been decided by a district judge from California prior to Judge Claiborne's appointment to the bench.

Undiscouraged, the government began pursuing two other claims by Conforte that he had bribed the Judge. One of these bribery charge related to Judge Claiborne's treatment of certain subpoenas issued to employees of Conforte in a voting fraud investigation. The other involved a bribe supposedly paid to the Judge so that he would secure a favorable outcome in Conforte's appeal from his tax conviction; at the time of this alleged bribe the appeal was pending before a panel of this court. We ultimately affirmed Conforte's conviction, but remanded for resentencing on three of the counts. *United States v. Conforte*, 624 F.2d 869 (9th Cir.1980). The Supreme Court denied a writ of certiorari, 449 U.S. 1012, 101 S.Ct. 568, 66 L.Ed.2d 470 (1980), and shortly afterwards Conforte fled to Brazil.

The District Director of the Internal Revenue Service in Reno, Nevada, who was fully familiar with Conforte's background and record, opposed the investigation of Judge Claiborne, because it was based almost exclusively on Conforte's statements. In early 1982, the F.B.I. and the Internal Revenue Service launched a "sting" operation involving an attempt to bribe the District Director. In late 1982, after the plan to "bribe" him had failed, the District Director was transferred to another office. A Treasury Department investigator later condemned the F.B.I.—I.R.S. sting operation as "very dangerous, misleading and poor work."

Beginning in September 1982, the F.B.I. and the Department of Justice presented their case against Judge Claiborne to a grand jury in Portland, Oregon. Conforte did not testify because he was still a fugitive from justice. The grand jury failed to return an indictment.

The government's allegations were presented to a second grand jury in Portland beginning in early 1983. Conforte remained a fugitive. The grand jury once again failed to return an indictment.

Meanwhile, Conforte had been attempting for some time to negotiate a deal with the government. In late 1983 an agreement was reached under which Conforte would return from Brazil and be resentenced to four concurrent terms of five years each, 15 months of which were to be actually served in prison, while the remainder would be suspended. In addition, the government agreed to drop federal bail-jumping charges and persuade Nevada state officials to drop certain state charges against Conforte, as well as convince state prosecutors to agree to concurrent sentences on all remaining state charges.

Conforte returned to this country on December 4, 1983. In the meantime the government had presented his charges against Judge Claiborne to still another grand jury. This time, however, the government did not proceed in Portland, but chose Reno, Nevada as its forum. Conforte testified before the Reno grand jury three days after his return. The following day the grand jury returned a seven count indictment against the Judge.

One week after Judge Claiborne's indictment, Conforte was resentenced by Judge John Lewis Smith of the United States District Court for the District of Columbia. Conforte's case had been transferred to Judge Smith in October 1982 by order of the Chief Justice of the United States after the District Judge in Nevada who had previously presided over the case recused himself. The reduction in Conforte's sentence may well have violated Fed.R.Crim.P. 35, *see United States v. Hetrick*, 644 F.2d 752 (9th Cir.1980); *United States v. Pollack*, 655 F.2d 243 (D.C.Cir.1980), as well as 18 U.S.C. § 3651 (1982), not to mention the Justice Department's policy on tardy motions to reduce sentences.

Senior United States District Judge Walter E. Hoffman, of the Eastern District of Virginia, was specially designated by the

Chief Justice to preside over Judge Claiborne's trial. In early 1984, Judge Hoffman denied a series of pretrial motions filed by Claiborne. (Previously, Judge Hoffman had been specially designated by the Chief Justice to preside over the Portland and Reno grand jury investigations. These designations, like the trial designation, were made following a request by the Chief Judge of this circuit that an out-of-circuit district judge be appointed.) An appeal to this court followed.

At the time of the pre-trial appeal, the case against Judge Claiborne still included the charges relating to his alleged acceptance of a bribe intended to influence the results in an appeal before one of our panels. We as a court agreed, although in a rather informal manner, to recuse ourselves from hearing Judge Claiborne's pretrial appeal. The Chief Justice then specially selected a panel of three judges from other circuits to hear it. The special panel affirmed the pretrial rulings of the specially assigned district judge. 727 F.2d 842, *cert. denied,* — U.S. —, 105 S.Ct. 113, 83 L.Ed.2d 56 (1984).

The trial then proceeded, with Joseph Conforte as a key government witness. Despite, or perhaps because of, Conforte's testimony the jury could not agree on a verdict on any of the counts.

Because the government abandoned the bribery charges prior to the second trial, Conforte did not testify the next time the prosecution sought to convict Judge Claiborne. Judge Hoffman once again presided over the trial. After the jury returned a guilty verdict on the tax charges, Judge Claiborne again appealed. This time we took no action to recuse ourselves. In fact, we did nothing at all. Although the bribery charges that indirectly involved our court in the proceedings were no longer a part of the case, we simply failed to consider, formally or informally, the question whether we now had an obligation to hear the appeal or whether a new special panel should be appointed. Apparently acting on the assumption that our prior recusal was a continuing one, the Chief Justice specially selected another panel of three judges from other circuits to hear the appeal.

II

ANALYSIS

It is clear to me that there was no reason in fact or law why a panel of judges of this court could not have heard Judge Claiborne's post-conviction appeal. The bribery charges had been dropped; the tax charges were unrelated to any alleged bribe and they in no way involved any member of this court. Moreover, our subsequent actions, specifically our en banc vote, show quite plainly that the overwhelming majority of the judges of our court believed that they were not required to recuse themselves from voting on a critical aspect of the proceedings on appeal. Our vote on the en banc call reveals that 19 members of this court, out of a then total of 25, concluded that it was proper for them to vote on the question whether or not Judge Claiborne's appeal should be given en banc consideration. Only six thought they were required to recuse themselves from participating in that decision. Because in my view there can be no distinction drawn between the propriety of a judge's voting on a call for a hearing en banc and the propriety of a judge's hearing the appeal itself, I believe that any three of the 19 judges of our court who voted on the en banc call could properly have heard the post-conviction appeal. Thus, in actuality, there was no need for the appointment of any out-of-circuit judges.

In my view, it is clear that we as a court committed a serious error in our handling of this case, an error with serious consequences. Specifically, we erred when we failed to consider whether we should hear Judge Claiborne's appeal from his conviction or whether, instead, the appointment of a second special panel was required. Because of our error, outside judges were appointed to hear an appeal that we had an obligation to hear ourselves. Our court system is structured so that a defendant will normally have his trial and any appeals heard by judges residing in the circuit in which the charged crime was allegedly committed. Here, we erroneously, albeit inadvertently, deprived Judge Claiborne of this feature of our laws; en banc consideration of the Judge's case would have been a proper means of at least partially remedying our mistake.

Rehearings en banc provide a means for ensuring that the law of our circuit is applied not only consistently but correctly. Here, as a result of our failure to act, judges from other circuits, not as familiar as we are with the precedents of our court, considered a case that we had a duty to hear.[2] Judge Claiborne's appeal raises several issues of importance.[3] In disposing of at least one of those issues, the special outside panel cited no authority from any appellate court, let alone a decision by the judges of this court. The special panel also stated that it was not following the result reached in two of the three district court opinions that it cited. 765 F.2d at 794–95. In my view, when a substantial question of law not previously decided by the judges of this court is decided by a panel of outside judges and we subsequently recognize that we have erred in failing to decide that question ourselves, it is our responsibility to grant en banc reconsideration. Moreover, in this case there are additional reasons why we should have granted an en banc hearing. *See infra* at pp. 1332–33.

Some of the members of this court who voted against an en banc hearing may have believed that an appearance of impropriety would arise if we were to review the conviction of a district judge who sits within the geographical boundaries of the Ninth Circuit; they may have thought that a decision to hear Judge Claiborne's case en banc would be ill-advised since it might cause some to think less well of our court, or of courts in general. I respectfully suggest that a vote influenced by such institutional concerns would unfairly prejudice Judge Claiborne's rights and contravene basic principles governing the law of recusal.

Courts must always strive to administer justice in a manner such that there is no appearance of either impropriety or injustice. At the same time, a court must never deprive a person of his right to just treatment or the opportunity to avail himself of the full procedural rights or protections to which he is entitled. Certainly it must not do so merely because a judge believes that it may appear to some persons that in affording an individual those rights the court has acted improperly. Our highest duty at all times is to provide justice to all litigants; no other principle is as important.

Normally, there is no conflict between our duty as individual judges to appear impartial and our obligation to afford justice to all. In those cases in which there is a conflict, there is usually some method of ensuring that both goals can be accomplished within the normal procedures governing the operation of the judicial system. For example, a trial judge faced with such a conflict can recuse himself, and another trial judge can be substituted. So, too, a circuit judge can, normally, readily be replaced by another circuit judge or even by a district judge. There are, however, a few cases in which there is no mechanism for resolving the conflict in a manner that allows the court to honor both obligations fully. In such cases the obligation to do justice prevails and the "rule of necessity" applies. Under that rule, the court must hear the case and do justice even though an appearance of interest or impropriety may exist. *See United States v. Will*, 449 U.S. 200, 213–17, 101 S.Ct. 471, 480–82, 66 L.Ed.2d 392 (1981).

The fact that Harry Claiborne is a United States District Judge does not mean that he is less entitled than any other individual to the full benefit of the orderly procedures of this court. Those procedures, including en banc consideration, have been established to ensure that justice is done. Our en banc process is also designed, as I noted earlier, to ensure that the law of this circuit will be applied uniformly to all defendants. Judge Claiborne has just as much right to have his case considered en banc as any other defendant. En banc proceedings are different in one critical respect, however, from all other proceedings this court conducts: only the judges of our court can hear a case of ours en banc. There is no procedure in current law for obtaining an out-of-circuit en banc panel. This is true even when an appeal is heard initially by a specially selected panel of out-of-circuit judges. Thus, if in fact an appearance of impropriety existed here, the rule of necessity would apply, and we would be required to disregard that appearance. Accordingly, if a factor in our decision to deny Judge Claiborne en banc consideration of his case was our concern over an appearance of impropriety, we have, in my view, seriously misconstrued our duty as judges of this circuit. In doing so, we have, unfortunately, also denied Judge Claiborne equal justice.

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[2] While circuit judges from other circuits and district judges sit on Ninth Circuit panels, title 28 requires that at least two of the judges on any panel be judges of this court. 28 U.S.C. § 46(b)(1982). *See also* Ninth Circuit General Order 3.2(a) (same).

[3] *See* Judge Ferguson's companion dissent for a discussion of two of those issues.

Moreover, had we agreed to rehear Judge Claiborne's case en banc, there would have been neither any actual impropriety nor any appearance of impropriety in our doing so. In my opinion, the public has the identical perception of a court of appeals' reviewing a district judge's conviction whether the appellate judges come from the same geographic area as the district judge or not. To most people the appearance would be similar whether the appellate judges were from the Ninth Circuit, or from the Second, Seventh or Tenth Circuits. If there were any appearance of impropriety in our hearing Judge Claiborne's case, it would stem from the fact that we are all judges together, all members of the "judicial fraternity", not from the happenstance of our physical locations.[4] Yet, no one has suggested that the special panel of circuit judges did not act in a proper and impartial manner, or that an appearance of impropriety exists because that panel might have favored Judge Claiborne. I believe the public is sophisticated enough to accept the fact that if a judge is to be tried, he will be tried before colleagues who are members of the same profession and that those colleagues may in some cases even reside in the same section of our nation. In short, I do not believe that reasonable persons would have had cause to think that any impropriety might have existed had we, as a court, simply followed our regular procedures and heard Judge Claiborne's post-conviction appeal in the normal course.

There *is*, however, an appearance of impropriety or injustice in this case—one that I fear a majority of my colleagues may fail to recognize. That "appearance" does not militate against affording Judge Claiborne en banc consideration; rather, it strongly militates in favor of granting him a hearing. Our refusal to do so allows the record to rest with the appearance that Judge Claiborne may have been the object of *adverse* special treatment and, thus, the victim of injustice. Judge Claiborne is one of the few criminal defendants in the Ninth Circuit, if not in the nation, whose case has been handled, both in the District Court and in the Court of Appeals, exclusively by judges specially and specifically chosen to hear that particular case.[5] There is, in my opinion, a rather substantial appearance of injustice when a defendant who claims he is the victim of a vendetta on the part of various branches and agencies of the Department of Justice is deprived of the opportunity to be judged by those who would normally preside over his case and instead is tried and convicted before, and has his appeal heard by, judges all of whom are specially selected for their assignments.

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[4] Of course, if an individual judge has a particular personal or professional relationship with the defendant, individual recusal may be required.

[5] There are no available statistics regarding the number of cases in which a similar designation of both out-of-circuit district and circuit judges has been made. Informal research makes it clear, however, that the procedure is invoked infrequently.

There is no doubt that every step taken in appointing the specially designated judges fully complied with all existing statutes and rules. Moreover, there is no suggestion in this case that there was in fact anything improper about the designation of the judges, or that any of the judges involved in the selection process acted with anything less than the utmost integrity. Nevertheless, in a case in which the defendant contends that he is the object of a prosecutorial vendetta, in which the judges who heard the case were all specially selected under a process that permits the selector total discretion to choose whom he wishes, and in which we as a court erred in permitting the specially selected panel to hear the appeal, I believe that an en banc hearing is required—if for no other reason than to ameliorate, to the extent possible, the appearance of injustice. En banc consideration by the judges of this court, judges who were not specifically selected to hear Judge Claiborne's appeal, would have gone a considerable way towards accomplishing that objective.

Unfortunately, as events unfolded, only an en banc review by this court or a hearing by the United States Supreme Court could have afforded Judge Claiborne consideration of his case by a tribunal that had all the appearances of fairness. All courts that have previously heard his case are open to the charge that they were specially selected for the purpose of ensuring the desired governmental objective. In my opinion, the proceedings thus far afforded Judge Claiborne fall far short of meeting the "appearance of justice" standard. Because of our obligation to administer justice in a manner that maintains confidence in the fairness and objectivity of the judicial system, I believe that it was our duty and responsibility to hear his case en banc.

III

THE RULES

As mentioned above, every step taken in this case to appoint the various special judges was taken according to existing and duly promulgated rules. However, in my opinion, we should seriously, and quickly, re-evaluate those rules. Under 28 U.S.C. §§ 291 & 292, the Chief Justice of the Supreme Court must designate and assign a circuit or district judge to act as a circuit or district judge in another circuit upon receipt of a "certificate of necessity" from the chief judge of the circuit to which the judge will be assigned. The Chief Justice may select any judge he wishes; there are no published guidelines or standards. Thus, when a certificate of necessity is issued in a specific case or proceeding, there will always be an appearance that the judges designated are being hand-picked to decide the controversy.

This appearance is particularly strong in criminal cases. In my view, the current rules should be modified so that any out-of-circuit judges designated to hear specific criminal cases are selected by a random selection system through procedures that are a matter of public record.

There are various alternatives to the present system that might be considered. For example, the chief judge of each circuit could designate a number of judges who are available for such special assignments. Then, the Chief Justice could select the needed judges in a random drawing from the pool. Alternatively, a case in which all the judges of a circuit are recused could be assigned to another randomly chosen circuit. The trial judge could be selected according to any random selection procedure used in that circuit. Any appeals could be considered by panels from that circuit selected in the ordinary course. Any petition for a rehearing en banc could then be dealt with by the judges of that circuit in the regular fashion. Numerous other methods of ensuring the appearance of fairness and objectivity in the selection process could certainly be devised.

Of course, problems similar to those discussed above can arise when a chief judge of a circuit designates and assigns a district judge to hold court in another district of that circuit pursuant to 28 U.S.C. § 292(b). A random selection system could also be devised for use by the chief judge of a circuit when he is required to make such a designation and assignment for purposes of a specific criminal case.[6]

IV

CONCLUSION

For the reasons set forth above, I respectfully dissent from the court's denial of an en banc hearing.[7]

UNITED STATES
v.
CLAIBORNE.

No. 84-1294.

United States Court of Appeals,
Ninth Circuit.

Feb. 10, 1986.
As Amended March 4, 1986.

PREGERSON, Circuit Judge, dissenting from the order denying hearing en banc:

Judges Ferguson and Reinhardt in their dissents raise a number of serious questions calling for en banc consideration. I voted to grant the en banc petition and feel constrained to dissent from our court's refusal to do so.

Harry Eugene CLAIBORNE, petitioner, v. UNITED STATES. No. 85–1197.

Case below, 765 F.2d 784.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

April 21, 1986. Denied.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF NEVADA

CAROL C. FITZGERALD
CLERK

REPLY TO:
☐ ROOM 333 U S COURTHOUSE
300 LAS VEGAS BLVD SOUTH
LAS VEGAS NV 89101
☐ ROOM 5003 U S COURTHOUSE
300 BOOTH STREET
RENO NV 89509

CERTIFICATION

I hereby certify that the attached reporter's transcripts consisting of the Volume numbers and page numbers indicated below represent the entire testimony of Harry E. Claiborne in the first trial held in action CR-R-83-57-WEH, USA vs. HARRY E. CLAIBORNE, as certified by the Index of the Official Court Reporter who prepared said transcripts:

Volume XII - Pages 3004 through 3032, inclusive.
Volume XIII - Pages 3035 through 3249, inclusive.
Volume XIV - Pages 3252 through 3309, inclusive.
Volume XV - Page 3476

Dated: September 13, 1986

CAROL C. FITZGERALD, CLERK

By: Linda Lea Sharer
Linda Lea Sharer
Chief Deputy Clerk

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CLERK, U. S. DISTRICT COURT
BY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE UNITED STATES OF AMERICA, Plaintiff, vs. HARRY E. CLAIBORNE, Defendant.	Case No. CR-R-83-57-WEH Reno, Nevada March 30, 1984 9:30 o'clock, a.m.

VOLUME XII
TRANSCRIPT OF TRIAL
Before the HONORABLE WALTER E. HOFFMAN, and a jury.

APPEARANCES:

For the Government:	STEVEN A. SHAW, ESQ. JAN N. LITTLE, ESQ. WILLIAM C. HENDRICKS, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ. WILLIAM J. RAGGIO, ESQ. J. RICHARD JOHNSTON, ESQ.
REPORTED BY:	SUZANNE KUES ROWE CSR NO. 127

with the car after picking it up?

A I don't recall that I did.

Q Why was the car bought in Reno instead of Las Vegas, do you know?

A I have no idea.

MR. SHAW: Thank you.

THE COURT: Are we finished with Mr. Horn?

MR. GOODMAN: Yes, and I would excuse him, your Honor.

THE COURT: Thank you, Mr. Horn. You may be excused.

MR. RAGGIO: Your Honor, may we approach the bench, please.

I need to talk to you.

THE COURT: Get the next witness.

(Whereupon a witness was duly sworn.)

(Whereupon an off-the-record discussion was held at the bench.)

MR. GOODMAN: Judge Claiborne.

(The defendant was duly sworn.)

HARRY E. CLAIBORNE, DEFENDANT, SWORN

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Please state your name to the ladies and gentlemen of the jury.

A Harry E. Claiborne.

Q Judge Claiborne, where do you reside?

A In Las Vegas, Nevada.

Q How old are you, sir?

A Sixty-six.

Q Where were you born?

A In McRae, Arkansas.

Q Would you spell McRae.

A M-c-R-a-e.

Q Would you tell the ladies and gentlemen of the jury about your education?

A I graduated from high school in McRae, Arkansas, high school. I attended Washtaw Baptist University in Arkansas, Duffy, Arkansas, three years. And then I attended Cumberland University in Lebanon, Tennassee, where I secured my L.L.B. degree.

Q And is that your law degree?

A It is.

Q After you received your law degree, did you practice in Arkansas?

A No, I did not.

Q What did you do, sir?

A I had, the secretary of defense drew the first draft number right after I graduated from law school and they, the first draft number, mine was 600 and something, I think it was 91, I'm not sure, and my number was 702. So I, rather than be drafted, I went down and enlisted and I don't expect any badge of patriotism because I just didn't want to be drafted and I knew I was going to be in a few days, so I went down and enlisted.

Q Did you go into the service then?

A Yes, I did.

Q Would you tell the ladies and gentlemen of the jury where you spent your time while you were serving the country?

A I was in what was called the Air Corps at that time, and I spent all of my time in the continental limits of the United States and I served at many, many, military bases in the United States during that 4.8 months -- years, rather.

Q You were in the service for close to five years, is that correct?

A That's correct.

Q While you were in the service, you went from station to station; is that correct?

A That's correct.

Q What is the highest rank you attained while you were in the service?

A Chief Warners.

Q Did you receive an honorable discharge?

A Yes, I did.

Q Did you spend any time while you were in the service in the area of Las Vegas, Nevada?

A Yes, I did.

Q Where did you, where were you serving while you were in Nevada?

A In 1942 I was transferred on special duty to Las Vegas Army Base where I spent approximately 90 days on acute military problem for the Air Corps and after that assignment was completed, I went back to my base.

Some two years later, I was transferred to Las Vegas Army Air Base as the, and assigned to the Provost Marshal Department and I was in charge of the miliary police in the downtown area of Las Vegas.

Q All right. There came a time when you were discharged; is that correct?

A That's correct.

Q When was that, sir?

A I believe it was December 5, 1945.

Q And the time of your discharge, what did you do?

A I, close to my discharge, I began to have to make a major decision about where I was going to practice law, and whether I would return to Arkansas. I had passed the bar in Arkansas or whether or not that I would practice law somewhere else. I decided to return to Las Vegas and take the bar examination and practice law there.

Q All right. When you went back to Las Vegas, after you were discharged from the service, how were you employed?

A I went to work as a policeman.

Q And for what city?

A Las Vegas Police Department.

Q And what type of duties did you perform as a policeman for the city of Las Vegas?

A I was a patrolman for a short time, and I was promoted to the Detective Bureau and was promoted to a detective and when I left, I was Sergeant of the Detective Bureau.

Q When did you leave the employ of the Las Vegas Police Department?

A I guess it would have been some time in the latter part of 1946, when I passed the bar and I went into the District Attorney's office.

Q And how long did you work in the District Attorney's Office?

A Two years.

Q What type of work did you do while you were in the District Attorney's office?

A I prosecuted cases.

Q And how was your success rate?

A Well, it was very good.

Q And after you left the District Attorney's office, what did you do?

A I went into private practice.

Q Did you specialize in any type of law practice when you went into private practice upon leaving the District Attorney's Office?

A No. You couldn't specialize in Las Vegas in those days, the population was approximately 16,000 people. You would have starved to death if you had been a specialist. So I took everything.

Q And did there come a time during your practice that you began to specialize in any particular area of the law?

A Oh, I would say not until maybe the last eight or ten years of my practice.

After I had been a general practitioner for about four or five years, then I began to specialize in trial work and became a trial specialist, and I mean to describe by that that I didn't have a general practice, I didn't write contracts and wills and those things, I was just a trial lawyer.

Q Somebody who went into court and litigated cases; is that correct?

A That's right for various litigants and hired generally by their attorneys.

Q Did you practice solely in Nevada?

A Yes.

Q All right. Where did you practice in Nevada solely in Las Vegas?

A Well, my office was in Las Vegas, but I handled cases all over the state.

Q And did there come a time before you became a judge, about ten years before you became a judge, that you began to specialize in any particular phase of the law?

A Well, I don't think I ever intentionally did so. I tried to maintain a balance through the years of civil and criminal practice, so that I wouldn't become a specialist in any particular field, civil or criminal, and I tried to keep a balance and I did a very good job of it up until about the last eight years of my practice and it became nearly all criminal. Surprisingly, I think I have tried as many civil cases in my lifetime as I have criminal cases, but people think of me as a criminal lawyer because you don't read about civil cases in the paper.

Q Were your cases of a publicized nature?

A Yes, they were.

Q What type of cases, could you tell the jury, did you defend which were highly publicized?

A Many cases. Murder cases.

Q Murder cases. What other kinds?

A Well, I -- all types of major civil and criminal cases.

Q Were you the subject of newspaper and media coverage over the years?

A Yes. Some of it good and much of it bad.

Q But would you say that you were always in the newspaper?

A I would say that.

Q Were you vocal as far as expressing your opinion concerning the various causes or persons that you were representing?

A Yes, I would plead guilty to that.

Q And did you make your feelings known to members of the media as well as to your opposition?

A Yes, I did.

Q Were there times when you handled cases of an unpopular nature?

A Many of them.

Q Were there times when Courts called upon you to represent persons who couldn't get representation because of the very unpopular nature of their problems?

A Countless times.

Q Was there a time even here in Reno where you represented an individual under those circumstances?

A Yes.

Q Was that the Williams case?

A Yes.

Q When was the Williams case, your Honor?

A I don't know what year. Mr. Raggio was a prosecutor.

Q Will you tell the --

A I don't remember what year it was, exactly.

Q Would you tell the jury what the Williams case was about?

MR. HENDRICKS: I am sorry to interrupt the testimony of the defendant, your Honor, but I don't see the relevance of this matter.

THE COURT: I don't either.

MR. GOODMAN: Your Honor, I believe it's relevant because of the history of Judge Claiborne and the fact that he had the type of reputation that he had, which carried over to the time that he was a judge.

THE COURT: I sustain the objection. We cannot try all of Judge Claiborne's cases that he has participated in.

MR. GOODMAN: I wasn't going to go through all of them.

THE COURT: Well, I have got to put a stop to it somewhere.

/////

BY MR. GOODMAN:

Q Judge Claiborne, during the period of time that you were practicing in Nevada, did you have the occasion to make enemies?

A Well, I'm sure I made many.

Q And there came a time that you represented a gentleman by the name of Joe Conforte, did there not?

A Yes.

Q When did you first represent Mr. Conforte?

A In 1967.

Q Under what circumstances?

A Well, he called me at my office in Las Vegas and asked me if he could come down and talk to me. And I asked him what about, of course, and he told me something of the case. And I said yes, I would see him.

Approximately an hour after he called, Stanley Brown, whom I had known, called me and he talked to me about Mr. Conforte's difficulty. But he was not with Mr. Conforte when he came down to see me about it.

Q And what type of matter did you represent Mr. Conforte on?

A It was a Mann Act case, White slavery.

Q What was the result of your representation?

A Well, he was acquitted.

Q And that was back in 1967, you say?

A That is correct.

Q You mentioned a gentleman by the name --

A I think it's the only case he ever won.

Q You mentioned a gentleman by the name of Stanley Brown?

A Yes.

Q When did you first meet Stanley Brown?

A I met Stanley Brown, I think, for the first time when he was Judge John R. Ross's law clerk, but just met him. Like I say hello, shake hands with him and that. It was not until he became the United States Attorney that I had some association for him and became friendly with him.

Q All right. Would you characterize your relationship to the jury with Stanley Brown over the years?

A It was a very enjoyable and warm friendship.

Q Was this a personal relationship as well as a professional relationship?

A Yes, it was.

Q Did you visit with Stanley Brown personally over the years?

A Well, countless times when I would come to Reno on a case, I would use Stanley's office. If it was a large enough case to accommodate it and the client could afford it, I would arrange for Stanley to be local counsel.

If it were not, and it was a routine case, well, then I would work out of his office. I would use his secretary and his paper and his typewriters and his library, what library he had, which wasn't very sufficient, but it was sufficient to do minor things with the case.

And I would see him daily through the trial nearly always either at lunch or in the evening, either for lunch or dinner.

Whenever I was in Reno, I always went to his office. I always went in to say hello regardless of what I was here on, if I was over in the Supreme Court, I'd stop on my way back and see him and visit with him.

Q All right. How many years was this relationship in existence between you and Mr. Brown before you became a judge?

A Oh, thirty years.

Q And did you ever socialize with him outside of the professional association when you were trying cases with him?

A Well, yes, I'd socialize with him.

Q Have dinner with him?

A Oh, sure.

Q And lunch with him?

A Yes.

Q Did you ever visit him at his home?

A Only one time that I can recall and that was after I became a judge.

Q And when he came to Las Vegas during the period of time that you were an attorney, did he visit with you?

A Always.

Q And did you socialize together at that time?

A Yes.

Q And did he do any business out of your office when you were in Las Vegas?

A Yes. He had the same privileges with my office that he had afforded me as to his.

Q Where was your office located in Las Vegas?

A 108 South Third Street. I was there 25 years.

Q Would you describe the physical make-up of the office as far as how the, what was on the shelves?

A What was on the shelves?

Q Yes.

A Pictures.

Q Okay.

A And books. You mean behind my desk? Books and pictures.

Q And what type of library did you have?

A I had a most adequate library for a trial lawyer. I had everything that I needed. Every reference book, our

Reporter System that I felt I needed in trial work for the simple reason it was a time saver and it saved more than for me and my clients for the simple reason I didn't have to walk to the county library and when an idea came and I needed to check it out, I could just do it right there.

Q Over the years, while you were an attorney, what was your relationship if any with Joe Conforte?

A (No response.)

Q Did you represent him other than that one time?

A I represented him only on the tax case. I represented his wife, I didn't represent Conforte, but that's hard to separate because while I represented his wife in this case and Bruce Hochman and Stanley Brown represented Mr. Conforte, Mr. Conforte pretty well controlled the finances and you had to arrange your fee through Mr. Conforte even though I was representing Mrs. Conforte.

Q So between the time that you represented Mr. Conforte on the Mann Act in 1967 and the time you represented Mrs. Conforte on the tax case, did you ever represent Mr. or Mrs. Conforte on anything else?

A Only on those two cases and they were trials, that's why I didn't do any other kind of business.

Q All right. When was Mr. And Mrs. Conforte indicted?

A 1977.

Q And where were they indicted?

A Here in Reno.

Q What were they indicted for?

A They were indicted, I believe on several counts of evading employment taxes.

Q Were you retained in the case?

A Yes, I was.

Q How did your retention come about?

A I received a call from Stanley Brown, advising me that the Confortes had been indicted, and he said I have talked to them and they want you to represent them. And I said, "Well, tell me something about the indictment," and he did. I believe he read it to me. And I told him, I says, "Stanley, that's not my cup of tea." I said get ahold of Bruce Hochman in Beverly Hills, he's the best tax lawyer I believe in America and I hope Mr. Johnson won't take offense of that, and said, get Mr. Conforte and go down and see Bruce and hire him. And they did.

My recollection is that while they were in Mr. Hochman's office, they called me. I first talked to Mr. Hochman. He said, "Did you know that there is trouble between Mr. Conforte and Mrs. Conforte?"

And I said, "Not really. I did not know that." And I had read about something in the newspaper about a man being murdered on the grounds of the Mustang Ranch and that there was some kind of involvement by Mr. Conforte and that Mrs. Conforte was some way involved in it.

But I didn't know the details and I had not thought of that when I talked to Stanley Brown.

THE COURT: Haven't we answered the question?

MR. GOODMAN: All right. I am asking how the Judge got retained.

THE COURT: Well, he's answered the question.

BY MR. GOODMAN:

Q Who retained you?

A Well, that's a hard question to answer. I mean eventually Mr. Con -- Sally Conforte retained me, but my first conversation was with Mr. Hochman. He asked me because of what he thought, concerning the difficulty between the Confortes that he not represent them both, and he suggested that I represent Sally. I talked, at the same time, to both Mr. Brown, who was with Mr. Hochman at the time, and he said that was Mr. Conforte's wish and Mr. Conforte got on the phone and I talked to Mr. Conforte and I said, "Well, do you want me to represent Sally Conforte?" and, "Everybody's talked to me about it except her." I said, "Have her call."

Q Did she call you?

A Yes, she did and two, three days later.

Q Did you work out some type of an agreement with her as far as representing her on the case?

A Yes, I did.

Q What was that, sir?

A I took the case, my agreement with everybody, I had an understanding with Mr. Hochman and Mr. Brown. I said, "I don't want this case, and I am busy with other cases, and I don't want this case." I said, "I will do it provided that I am not the chief counsel, provided he is the lead counsel, and I am not responsible or obligated for all of the work and preparation of the case."

I said, "I will come there, but I will not prepare it and I will not do anything but the ordinary work that you would do in the preparation of the instructions and maybe the opening statement."

I said, "On that basis," I said, "I will come and represent her."

Bruce Hochman agreed to be lead counsel and actually was counsel for both parties during the trial. I had very little participation in the case and that was the agreement that I had with everybody concerned. I told them that I would come and what I call "ride shotgun" for as long as it lasted on the basis of $1500 a day. My total bill and total money received by Mrs. Conforte in this entire case, save and except the appeal was $6950.

Q That was the total fee that you received for representing Mrs. Conforte at the trial?

A That's correct.

Q All right. Did there come a time that the trial was going to begin where you had a meeting with the attorneys and Mr. Conforte?

A That's correct.

Q And at that meeting, was there a discussion about whether or not the Court should try the case by waiving a jury or whether there should be a jury trial?

A Because of my agreement with Mr. Hochman, I did not come to Reno until the Saturday before the trial started. I don't remember whether it started on a Monday or a Tuesday. I think it started Tuesday.

But I recall coming to Reno on Saturday. Naturally, we had a general meeting between all of the attorneys in the case, Mr. Harvey Tack who was an assistant to Mr. Hochman, Stanley Brown and myself. The usual things were discussed, trial tactics, and so forth.

On Sunday we had a meeting with Mr. Conforte and at that time we had to make a decision whether or not we try it before the jury or before the Court.

Mr. Hochman wanted to try it before Judge Thompson. Mr. Hochman was a scholar in tax law. Judge

Thompson is one of the most intelligent and able federal judges in America in my opinion. Because of Bruce Thompson's high intellect and because Hochman was a scholar in that field of law, he felt we would be much better off trying the case before Judge Thompson than we would be before a jury.

He was fearful that because of the complicated nature of the tax law on the question of employment taxes that in all of the, as Judge Hoffman has adquately said and called garbage in this case, that the jury might get lost in it.

Mr. Hochman -- Mr. Conforte, strange as it may seem, was all for trying the case before Judge Thompson, and he said, "Well, he turned me loose back in 1967."

Q That's when you represented him before?

A That's right.

And he wanted to try it before Judge Thompson because he felt as he said, "Judge Thompson likes me."

Mr. Brown had no thoughts either way.

Q That's Stanley Brown?

A That's correct. I decidedly thought it was a mistake to try the case before the Court. I -- my position in the case would have urged a jury trial and mainly because I had had more success with juries than I had with judges, and I was a great believer in the jury system.

I thought that twelve people would do a better job. It was just my opinion. But I was eventually outvoted. Nobody did anything over my will, I finally agreed also.

Q And did the case go to trial in front of Judge Thompson?

A That's correct.

Q How long did the trial last, if you can recall?

A The trial lasted three days.

Q And at the conclusion of trial, did Judge Thompson reach a verdict?

A Yes, he did.

Q And what was his verdict, if you recall?

A He found the Confortes guilty on four counts.

Q And did there come a time thereafter that there was a sentencing set?

A Yes.

Q Were you the attorney for Sally Conforte at that time?

A That's right, in October of '77.

Q And did you appear when the sentencing took place of Joe Conforte and Sally Conforte?

A I did.

Q And what sentence was imposed on Joe Conforte?

A Joe Conforte received a five-year consecutive sentence on each of the four counts.

Q Which would have been a total of?

A Twenty years.

Q Did he also receive some type of monetary punishment?

A Yes. He was fined, I believe, $40,000.

Q And as to Sally Conforte, what took place?

A She received probation and a fine.

Q And thereafter was there a discussion as to whether or not an appeal should be filed?

A Yes.

Q Were both -- well, was Mr. Conforte permitted at liberty on bond pending appeal?

A Yes. My recollection is Judge Thompson awarded Mr. Hochman and myself custody of him in some strange way. I mean we wound up responsible for him while he was posting his bond.

Q And he was permitted to remain at liberty while the appeal was going to take place; is that correct?

A That's correct.

Q And Sally Conforte of course, she was free at the time that the appeal was pending?

A That is correct.

Q During the -- did you participate in the filing of the Notice of an Appeal?

A Yes.

Q And did you participate in the handling of the appellate process on behalf of Sally Conforte?

A Yes, I did. I participated of writing and was responsible for the opening brief.

Q Did you have a fee arrangement independent of your trial fee as far as the appeal was concerned with Sally Conforte?

A I did.

Q And what was that?

A $10,000.

Q And did that cover the entire appellate process?

A That's correct.

Q And you did in fact, as I understand it, participate in the writing of the first opening brief on the appeal?

A The opening brief was written under my supervision and I was responsible for it.

Q Did anybody help you?

A Yes. Annette Quintana and yourself.

Q And what type of services were rendered by Annette Quintana and myself?

A Well, Annette Quintana did the research and you and I determined what of it we wanted to use on appeal and how we would use it.

Q Now, while the matter was pending on appeal, did there come a time that there was a discussion concerning a potential bias on the part of Judge Thompson when he heard the Conforte case?

A After the, I believe the point in time was in February, somewhere in February of 1978, or maybe that a -- I think it was March, around March the 3rd, 1978, Motion for New Trial was filed.

It was not filed by me. It was filed by yourself for Sally Conforte and I would not participate in the Motion for New Trial. The Motion for New Trial was based upon an alleged prejudice and bias of Judge Thompson, Judge Thompson on the day we appeared before him said everything in the world to us, but without coming out and saying it, specifically that anyone with an ounce of brains would have known that Judge Thompson is telling you, "Don't try this case before me," or that he did not want to hear the case and was not pleased with the fact that we wanted to waive a jury.

And everybody insisted and I was one of them, and he tried the case.

Everybody was clamoring for Judge Thompson to hear the case. All of the lawyers, Joe Conforte, Sally Conforte and everybody else connected with the case. Immediately when he gave them a jail sentence, well, then they went running out and they got a statement and affidavit and friends that Judge Thompson was overheard at some cocktail party saying that Joe Conforte was "a no-good S.O.B. and should be run out of the state." On the basis of that, they were going to file a Motion for New Trial to set the sentence aside because of prejudice of Judge Thompson.

I thought it stunk. I told everybody that I am not going to be a party to it and I pulled out at that point. I had no other connections with the case until, save and except, delivering the brief because in this period of time I had finished a brief on March the 1st. I signed it in my office, I sent it over for you to sign, you signed it, Mrs. Quintana signed it. We mailed a copy to the Ninth Circuit and I sent Sally Conforte a copy and two copies to Stanley Brown and two copies to Bruce Hochman. And that ended my participation in any legal work for the Confortes.

Q Until that time in March of 1978, had you received any monies towards the fee which you quoted on the appeal?

A No.

Q Did there come a time in 1978 when you were being considered for federal judgeship?

A That's correct.

Q And when were you first notified that you were being considered for appointment to the federal bench?

A In April, the 18th, 1978, Judge Thompson took senior status. He wrote a letter to the president of the United States in which he advised him that he was taking senior status as of September 1st, 1978.

He did it early so that the selection process could be going on before he, it became effective so there wouldn't be any delay, that there would be an active judge step right in on the day he took senior status and take over the court calendar here in Reno.

I was, that was on the 18th that he notified the president. Somewhere around the 23rd, I was notified that my name had been sent forward to President Carter and then there was an FBI investigation.

THE COURT: That's April 23rd, Judge?

THE WITNESS: Yes, sir.

And I believe that the -- yes, sir, that's the correct date.

And it was a usual FBI investigation and then of course a hearing before the Senate Judiciary Committee.

BY MR. GOODMAN:

Q Did you personally attend that hearing?

A Oh, yes.

Q And you were asked certain questions about your qualifications; is that correct?

A I wasn't asked a question. Strange as it may seem, Senator Laxalt was a member of the Judiciary Committee and he came down and he left the podium and he came down and sat with me during the proceedings and he made a statement outlining my career as a lawyer, and his long association with me, and Senator Cannon also said a few kind words and none of the senators asked me a single question. I understand there were no protests received, at least that I, that they announced.

And the next day the Judiciary Committee sent it over to the Senate and the very next day after that, which was August the 9th, I was confirmed by a unanimous vote of the Senate.

Q Did there come a time thereafter when you were appointed to the Federal Judiciary by the President?

A That's correct. September 1st.

Q On September the 1st of 1978?

A That's correct.

Q And at that point, did you undergo a swearing-in ceremony in Las Vegas, Nevada?

A I did.

Q And thereafter did you begin to perform your duties as a federal judge?

A I did.

MR. GOODMAN: Your Honor, at this time I would suggest that we -- it would be a good breaking point.

THE COURT: All right. I think so too, at this time.

Thank you, Judge. You may stand down.

THE WITNESS: Thank you, sir.

THE COURT: Members of the jury, I will excuse you at this time until Monday morning at 9:30 with the same admonition with respect to the not permitting anyone under any circumstances to talk to you and you not confer with anyone at all about the matter, and of course, abstain from reading any newspaper or listening to the television or radio.

Thank you very much and I hope you have a pleasant weekend.

(Whereupon the jury was excused.)

THE COURT: Gentlemen, I only have four requested instructions from the defendant. Kind of slim.

MR. GOODMAN: As I explained to the Court this morning, the Court may recall that I plan to work on it over the weekend and come in with the bulk of them. These are just special instructions.

THE COURT: I am supposed to have some time to go over them too, and I can see now with Judge Claiborne on the witness stand and you probably have one more witness, but I assume the Government will have some rebuttal, although I don't know, it may well be that this case will go to the jury next week.

We are fast approaching the end of the defendant's presentation of his case in chief; isn't that right?

MR. GOODMAN: That's correct.

THE COURT: Well, if you can let me have them, Mr. Goodman, by Monday morning, I would appreciate it.

MR. GOODMAN: I will and if I may, your Honor, because of the weekend once again, if I could, does the Court have -- may I inquire of the Court whether the Court has Devitt and Blackmore available to it?

THE COURT: Yes.

MR. GOODMAN: Would it be sufficient --

THE COURT: It's sufficient if you desire a Devitt and Blackmore instruction to merely give me the reference.

MR. GOODMAN: Would the same policy apply to the Ninth Circuit suggested instructions?

THE COURT: Yes. I have the Ninth Circuit. Mr. Johnston advised me that will eliminate a lot of typing for you.

MR. GOODMAN: I appreciate that. Mr. Johnston, over the weekend, will be working on the tax instructions and I can assure the Court, Monday morning we will have a bunch.

THE COURT: All right. Anything else, gentlemen?

MR. SHAW: No, your Honor.

THE COURT: All right. If nothing further, Court will be in recess until Monday morning at 9:30.

(Whereupon the proceedings recessed until April 2, 1984 at 9:30 a.m.)

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CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk
United States District Court
By Linda Lea Shaw
Chief Deputy Clerk

ORIGINAL

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE UNITED STATES OF AMERICA,)
)
Plaintiff,) Case No. CR-R-83-67-WEH
)
vs.) Reno, Nevada
) April 2, 1984
HARRY E. CLAIBORNE,) 9:30 o'clock a.m.
)
Defendant.)
)

FILED
JUN 12 1984
CLERK, U. S. DISTRICT COURT
BY

VOLUME XIII
TRANSCRIPT OF TRIAL
Before the HONORABLE WALTER E. HOFFMAN, and a jury.

APPEARANCES:

For the Government: STEVEN A. SHAW, ESQ.
WILLIAM C. HENDRICKS, III, ESQ.
JAN M. LITTLE, ESQ.

For the Defendant: OSCAR B. GOODMAN, ESQ.
WILLIAM J. RAGGIO, ESQ.
J. RICHARD JOHNSTON, ESQ.

REPORTED BY: SUZANNE KUES ROWE
CSR NO. 127

RENO, NEVADA, MONDAY, APRIL 2, 1984, 9:30 A.M.

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(The following proceedings were held in open court out of the presence of the jury.)

THE COURT: I take it we are ready for the jury, gentlemen?

MR. JOHNSTON: Your Honor, I have one matter. I am not sure whether this is the appropriate time to bring it up.

We were served last week by counsel for the prosecution with a memorandum in support of admissibility of evidence to impeach our expert witness. I want to be heard on that at some time outside the presence of the jury.

THE COURT: Yes. I would assume, of course, that they have a perfect right to impeach your expert, but I would assume also that that comes up as to whether the expert is in fact qualified.

MR. JOHNSTON: As I understand the burden of the memorandum is that they don't propose to challenge his credentials as an expert, but if he's permitted to testify as an expert then they want to impeach his testimony. It raises a very serious problem, your Honor, and I do want to be heard before that decision is made.

THE COURT: I will certainly afford you the privilege of being heard. I hope both of you have some authority on the subject. That was handed to me about a week ago, I guess pretty near to that.

MR. JOHNSTON: I think we received it on Thursday evening, if I remember correctly.

THE COURT: Well, maybe that's true. I can't keep track of when these matters are handed to me, but please give me the benefit of any law that you have on the subject.

All right. Anything else then? If not, call the jury. I believe Judge Claiborne was on the witness stand.

(The following proceedings were held in open court before the jury.)

THE COURT: Good morning, ladies and gentlemen. When we recessed on Friday, Judge Claiborne was on the witness stand and of course he remains under oath.

Mr. Goodman, you may continue.

MR. GOODMAN: Thank you, your Honor.

HARRY E. CLAIBORNE, DEFENDANT, PREVIOUSLY SWORN

DIRECT EXAMINATION (Resumed)

BY MR. GOODMAN:

Q Judge Claiborne, when were you sworn in as a federal judge?

A September the 1st, 1978.

Q Where did the swearing in take place?

A Las Vegas, Nevada.

Q After you were sworn in, where was your assignment?

A Reno, Nevada.

Q When did you come to Reno, Nevada?

A On, I believe I started on September the 11th.

Q Where did you reside when you came to Reno on September the 11th?

A First at the Holiday Hotel, until I could get into my apartment on 3250 Plumas.

Q Is that the Sundance West Apartments?

A That is correct.

Q Apartment No. 318?

A That's correct.

Q Would you describe the interior of the apartment to the jury?

A Well, it was a one room apartment. It was small, when you went into the front door immediately to the right was a kitchen. The hallway led past the kitchen down to another short hallway that led into a bedroom and the opposite side of the small hallway was a bath.

The other end of the hallway was a living room, and the living room and the dining area was the same room.

Q Was there a counter area?

A No.

Q Were there stools in the apartment?

A Never.

Q Did Stanley Brown visit that apartment?

A Never.

Q Did Joseph Conforte visit that apartment?

A Never.

Q After you came to Reno for your assignment, did you have the occasion to socialize with Stanley Brown?

A Oh, yes.

Q And in what form would that socialization take place?

A I would have lunch with Stanley about, always at least once a week. Most generally twice a week and sometimes three times a week.

Q During one of these luncheons, was there occasion to discuss the fee which you were owed by Sally Conforte?

A Yes.

Q When was that?

A It was immediately after I arrived here. I said to Stanley, "I've sent bills to Sally, I haven't received my money," and I said, "I want it."

And he said, "I will talk to her."

Some several weeks passed. I mentioned it to him again, and he said that Sally told him that Joe controlled the money and that he was not in town and that he would take it up with Joe on the first occasion he had to see him.

He called me one day and he said, "Your bill was $10,000," and he said, "That was the agreement, but you got out of the case and they don't feel like they should pay you the full amount."

I said, "I agree." I said, "I wrote the opening brief. I would have been obligated to write the reply brief," which I did not do, and I said, "So I will reduce the amount to $5,000."

Q Was the $5,000 ever delivered to you?

A Yes.

Q By whom?

A By Stanley Brown. He called me at the courthouse just as I stepped into my chambers one day and said, "Come by. I have your money." And I rode over to his office with Mary Hilt, my reporter, and I got out of the car there and I went into his office and he handed me $5,000 cash.

Q Are you able to tell the jury about when that transaction took place?

A The 23rd day of October, 1978.

Q Did you make a notation of that?

A Yes, I did.

Q Where did you make the notation?

A I made a notation on a slip of paper and a note, put it in an envelope in my desk when I got home, which was customary. And eventually recorded it in my own private account book that I kept.

Q I'd like to call your attention, your Honor, to a time in November of 1978, and ask whether or not you recall a case involving a Sessina Lowe and an Olga Karaway?

A I do.

Q Okay.

A Very well, now.

Q Could you advise the jury how that matter came to your attention.

A Well, the matter first came to my attention some time in the first week of December or the second week in December, I don't remember exactly which, in the regular course of, of the calendar.

In other words, I received my calendar generally on Monday morning for the week. I would just guess and say that I, since the first hearing on the matter was the 14th, that Monday preceding the 14th would have been the first day that I had been aware of the case.

Q And what made you aware of the case?

A I have a recollection that I became aware of it because of a notification from the United States Attorney's Office that counsel for the two ladies that were involved in this case had served FBI agents working on the case with a subpoena, without complying with the rule, and that they were filing or had filed a motion to quash, and that they wanted to hear their motion to quash the petitioner's subpoena of these FBI agents in advance of the hearing.

That is my first real knowledge of the case.

Q All right. Was there in fact a hearing before the Court?

A Yes, there was.

Q What took place at that hearing?

A Well, I believe the record shows that, I think that the hearing went on, the first hearing of any kind was on the 14th, and I ordered the attorneys for the petitioners to comply with the rule, and I continued the hearing on the motion to quash until January.

On a specific date -- and I don't remember what date in January -- by reason of calendar difficulties, the case then was set over, which is ordinary, I believe until February and was eventually heard some time in March.

Q To the point of time from the time that the motion to quash was filed until the matter was heard in March of 1979, did you have any discussions with Joe Conforte about how that matter should be treated?

A Absolutely not.

Q Did you have any discussions with Stanley Brown as to how that matter should be treated?

A No.

Q In March of 1979, what took place?

A Well, the matter was argued, each side had submitted briefs, I had become familiar with the briefs before I heard the arguments. It was argued and the case then was taken to Las Vegas. I was handling, not both calendars completely, but I was handling the Reno calendar.

Q In other words, did you travel from Reno to Las Vegas?

A To Las Vegas.

Q Would you be holding court in both places?

A That's correct. They were trying to balance it. I would hold court about two weeks every month in Las Vegas and the remaining two weeks in Reno.

When this motion was heard, well, then say we would take, if we were going to Las Vegas, well, then we would take the files of those cases that were submitted. If I took the case under advisement and ordered it submitted and taken under advisement, well, then I would take the file back to Las Vegas or from Las Vegas to Reno, vice versa.

Q Were you being assisted with the decision-making process at all by your law clerk?

A Yes, I was.

Q What was he doing for you?

A Well, he would, you work with your law clerks. I work with my law clerks and I think every federal judge works with their law clerks differently. I work with my law clerks; after arguments, I would quickly, while my mind was uncluttered with other matters, talk generally to my law clerk about, whoever it was assigned to about the arguments and about the legal propositions and ask him to brief it.

At some point in time, my law clerk would bring a memorandum in. Generally from the memorandum, you can tell pretty well who is right and who is wrong.

Then you take the memorandum, you study it yourself and I can never remember a case where I didn't do some independent research on it myself, despite the fact that I had highly qualified law clerks, and that was the procedure in this case.

This case was assigned to Mr. Cornell. Mr. Cornell began to research the case, he filed a memorandum with me. I looked the memorandum over, and I read the cases, and I came to the conclusion that the Government was wrong -- I mean right and the petitioners were wrong.

I wrote a decision to that effect.

Q All right. Now, was the matter placed under submission at any point in time?

A I believe the matter was, on the day it was argued, I ordered it submitted.

Q What does that mean?

A In other words you just say the matter now stands submitted and under advisement. That means the case is submitted at that point. Otherwise, it's submitted by a transmittal of a notice of submission by the clerk to your office. And our time begins to run from the time that either the Court orders it submitted or a notice of submission by the clerk's office.

Q Now, you say "our time begins to run"; what do you mean by that?

A Well, the administrative office requires that we rule on all matters before us within 60 days or we file a report to the effect why we have not.

Q Is that 60 days from the time of submission?

A That is correct.

Q And could you tell us how much time elapsed from the time of submission on the original motion to quash until the time that you wrote your decision?

A Ten days in this case.

Q And thereafter what took place, if anything?

A Well, they filed a notice of appeal.

Q Who did?

A The petitioners.

Q That was the attorney who was representing the two prostitutes?

A That is correct, and then they wanted to file a motion for reconsideration, and my law clerk came in and he, and I believe this was Mr. Horn -- I don't believe it was Mr. Cornell; it may have been Mr. Cornell, but I can't possibly remember all those dates -- and mentioned to me that they wanted, the petitioners wanted to file a motion for reconsideration or had filed a motion for reconsideration, but they had also filed a notice of appeal. And I told him, I said, we will call him and tell him that this Court no longer has any jurisdiction because they filed a notice of appeal with the Ninth Circuit.

Then he came back in and he said they are going to withdraw their notice of appeal. I said, "Well, if they do that, well, then this Court has jurisdiction to hear a motion for reconsideration."

Somehow, counsel for the petitioners were under the impression that they needed a leave of Court in which to file the petition for reconsideration and I have a dim recollection of my law clerk, whichever one it might have been, mentioning to me that they wanted to come in to see me, to get an ex parte order for leave of Court to file a motion for reconsideration and I said, "Well, they have already filed it," and I said, "This is ridiculous," and I said, "They don't need it to start with," and that's the way it ended and of course it was eventually they briefed it.

Q Who briefed it?

A The petitioners filed a brief and Mr. Lutfy came to see me and said that he was engaged in some very serious trial as I recall.

Q Mr. Lutfy was the --

A United States attorney, and told me that he could not possibly, because they were working with a short amount of personnel here in Reno, and he could not possibly have filed a response to their brief because of some very important case he had, as I recall. And I said, "All right," I said, "Do it when you can."

THE COURT: I take it, Judge, that the notice of appeal had been withdrawn?

THE WITNESS: They withdrew it, yes, sir.

And I said, "Do it when you can, but do it as quickly as possible," and some time passed.

In July, some time in July, I wrote him a letter and I was in Reno and I reminded him. I said, you still don't have your brief in this matter.

/////

BY MR. GOODMAN:

Q You are reminding who? The Government attorney?

A Mr. Lutfy, the Government attorney, and he told me he would have it in in a few days. Some time in July my clerk called to my attention that he had still not filed a brief and I wrote Mr. Lutfy a letter and reminded him of my conversation that I had with him in Reno and asked him to file his brief.

I recall that the brief was filed rather promptly after that letter.

Q Was the matter then submitted to you?

A Yes, it was.

Q When was it submitted?

A I do not recall when it was actually submitted, but my best recollection is that, my recollection is that it was submitted three times. I have read the docket sheet and it says "submitted by Ed Horn three times."

I really don't understand that, but within a very short time after his briefs were filed and it was submitted, I recall a second time. I denied the motion for reconsideration a second time.

Q Once again you ruled in favor of the Government?

A That's correct.

Q And how much time -- did you go on vacation during the interim from the time that the matter was submitted until it was finally decided?

A Yes, I did. And my recollection is that it was submitted some time in August, I believe the middle of August. We then went through the usual procedure that we go through. Mr. Cornell began to research it once again and study the briefs and then I went on my vacation in September. I came back early as is customary for federal judges, people don't believe it but it is true, and then I talked to Mr. Cornell when I came back. We discussed the matter, I recall having two lengthy conversations with him about the matter.

Finally I concluded that once again the Government was right and the petitioners were wrong and I so ruled.

Q All right. Did you grant a stay?

A Yes, I did.

Q What is a stay?

A Well, a stay of proceedings means that the litigation cannot continue, pending the appeal.

Q And why did you grant the stay?

A I was submitted -- they filed a motion to stay, and when I received the motion to stay I contacted Mr. Lutfy and I said, they -- "I received a motion to stay on the part of the petitioners," and I said, "Are you going to file any response? If so, I will await my decision on the matter and he said that he did not think he would, that he would get back to me in a few minutes. He called back in a few minutes and he said that the Government would not file a response to the motion and that they were anxious that the matter was being appealed to the Ninth Circuit because they wanted a decision from an appellate court on the position that they had taken. He said they felt I was absolutely right, and they looked forward to the appeal.

Q All right. From that point in time --

A So I signed the stay.

Q After you signed the stay, did you have any contact whatsoever with the case thereafter?

A None at all.

Q The matter was then up in the Ninth Circuit and handled in the Ninth Circuit Court of Appeals. Would it be fair to say you had no jurisdiction at that point?

A That is correct. Mr. Lutfy also said, I asked him, I said, "Do you have any statute of limitations problem with this case," which is customary. For the simple reason that I did not want the petitioners being in the appellate court and when the statute of limitations had nearly run, because sometimes, that's a gimmic that defense lawyers use to get as much time on the statute of limitations run as they possibly can, and I didn't want it to happen in this case and I said, "Do you have any problem with the statute of limitations?", and he said "Absolutely not. Absolutely not."

Q In the performance of your judicial functions, had you granted stays in other cases?

A Are you talking about identical cases?

Q No, in other cases?

A Yes. Many.

Q Were there other identical cases?

A By name ?

Q Not by name, but by a Grand Jury proceeding where a motion to quash was --

A I have uniformly in witnesses before the Grand Jury, always granted a stay; otherwise, I mean when a person comes in and files a motion to quash a Grand Jury subpoena, he's ordinarily an ordinary citizen. He's a witness to appear before the Grand Jury, and he has a bonafide reason why he does not want to appear before the Grand Jury. When he files the motion, it's generally within a day or so before his appearance before the Grand Jury.

If you did not grant a stay, he would be called before the Grand Jury and would have to testify before the Grand Jury before his motion to quash the Grand Jury subpoena was ever heard.

Out of judicial fairness, I always grant a stay on motions to quash Grand Jury subpoenas.

Now, I did not do that, I generally just call the United States Attorney and I said, "Don't call this man before the Grand Jury until we hear this matter."

And that's the way it generally works. Most times it's unnecessary to even do that. Because the United States attorneys are, most times, fair in these situations and most times when a lawyer files a motion to quash a witness, the United States Attorney voluntarily tells the lawyer, "Well, we will hear it and don't worry, we won't try to call him until the motion's heard."

I found now that that's the way it generally works.

Q I'd like to ask you, during the period of time when the motion to quash was filed back in, around December of 1978 until such time as the matter was ultimately appealed to the Ninth Circuit, did you have any discussions whatsoever with Joe Conforte about that case?

A Absolutely none.

Q Did you have any discussions during that period of time with Stanley Brown?

A Absolutely none. I had lunch with Mr. Brown dozens of times and he never one time ever mentioned to me anything even close to the Storey County investigations.

Q I would like to call your attention, Judge, to that period of time in December of 1978 involving the week of December the 11th of 1978. Are you able to tell me, Judge, where you were on December the 12th of 1978 during the early evening hours, let's say from about 7:00 o'clock to 10:30, 11:00 o'clock on that evening?

A I was with Justice Gunderson.

Q And how did that meeting take place?

A Approximately 4:30 on the 11th.

Q Which would have been a Monday; is that correct?

A That's correct. I was trying a case and I believe the case was two co-defendants, Sneed and Pittman, and I recessed and went into my chambers and just as I went into the chambers, Justice Gunderson called. And he wanted to have dinner with me and we agreed on meeting -- he wanted to have dinner with me that evening. He was in Reno at the time, and I for some reason that I don't recall, I suggested that we have dinner the next evening, which would have been the 12th. And we did.

Q Where did you have dinner?

A At the Holiday Hotel.

Q And during what hours were you together with Justice Gunderson at that time?

A As I recall, I was to meet him at 7:30 and I was early. I know I arrived first.

Q And did he come thereafter?

A Yes. He was there by 7:30.

Q Where did you have your dinner?

A We had dinner in the coffee shop. We planned to have dinner in the Shore Room, but I don't know what occurred, but I do recall that we had dinner in the coffee shop instead.

Q And after dinner, where did you go, if anyplace?

A We didn't go anywhere. We stayed in the hotel. We had our dinner, we then went into the hotel proper and we sat and talked. We hadn't seen each other in some time, and we sat and talked about a lot of things, in two different places. We sat first in the keno parlor. We sat down on two chairs in the keno parlor. We were not playing Keno, we just sat there. The Holiday has no lobby as such. We talked a while there and then we moved over to a table near the bar.

Q And how long did you stay with Justice Gunderson the evening of the 12th?

A I would say 10:30.

Q And did he then leave you or did you leave him?

A We walked out to his automobile and we talked a few minutes at his car. And both of us are very verbose, and we stood and talked a few minutes and he got in his car and he drove away.

Q About that time, Judge, around that week in December of 1978, were you contemplating the purchase of an automobile?

A Yes, I was.

Q And did you actually go out and take test drives in automobiles?

A Yes, I did.

Q Where did you go in order to see whether you were going to buy a particular car?

A Well, I bought the car from International Motors and that's where I first went.

Q Do you recall the day you bought the car?

A Yes, I do. I bought it on the 13th.

Q And that was Wednesday the 13th of December of 1978?

A That's correct.

Q Do you know how you paid for the car?

A Paid by check.

Q And prior to the 13th, did you have occasion to go out there and test drive any cars?

A I was there twice. I was there on a Saturday, the Saturday before I bought it on Wednesday and I met Mr. Derr.

Q Is he the car salesman?

A That's correct.

Q Okay.

A And we talked and I looked at automobiles and he had a used Mercedes that he was trying to sell me and I looked at it, I looked at the other automobiles too while I was there, and then I left. I came back on Monday and I looked at the Mercedes again, it was a used Mercedes but it was very, very clean and immaculate. It was a tremendously fine automobile for its age, let's put it that way.

I came back on Monday and we, once again, Miss Hilt, I had no car here, and I rode to and from work with Miss Hilt and she drove me down there and I got out and, on Monday afternoon, and test drove the car and Mr. Derr drove me back then to my apartment.

Q Now, I'd like to call your attention to the 14th which is a Thursday, December the 14th of 1978. Do you recall where you were in the evening hours on that date?

A On the 14th?

Q Yes, sir.

A On the 14th I went to dinner with Miss Hilt.

Q Do you know where you went to dinner?

A We went to Marie Callender's.

Q Where did you meet Miss Hilt that evening?

A In front of my apartment.

Q About what time?

A 7:30.

Q And did you go directly to Marie Callender's?

A No, we did not.

Q Where did you go?

A We started to go directly to Marie Callender's. On the 13th I bought the car and I asked them to put a weather protector on it, and I think they called it polyglo coat or something like that, and the next day they had forgotten to do that. On the 14th the car was not ready when I got off the bench, so when Mary came by and picked me up and we started to Marie Callender's, I said, "Drive me over to, if you will, to a car place." She had driven me there before. She knew exactly what I was talking about and she drove me over to the International Motors and the lights were on, but they were gone, closed. I jumped out of the car and I shook the door and nobody was there and I just thought maybe the car would be ready.

Q About what time was that that you went into International Motors on the 14th?

A What time we got there, I don't know. We left my apartment at 7:30 because that was our understanding. We were going to dinner at 7:30. I don't know what the driving time would be from here to International Motors, but whatever the time was, would be, that's what time it was.

Q Then you had dinner at Marie Callender's?

A That's correct.

Q What time did you leave Marie Callender's that you can recall?

A I would guess that we left Marie Callender's somewhere around 9:00 or 9:30.

Q Where did you go after you left Marie Callender's?

A Went back to my apartment.

Q Did Mary Hilt drive you back there?

A Yes, she did.

Q And what time did you arrive at your apartment that evening?

A 9:30, 9:45, somewhere in there.

Q I'd like to call your attention now, Judge, to the daytime hours of December the 15th which was a Friday of 1978 and ask whether or not you can recall whether, what time you got out of court?

A Well, I think I got out of court about 10:00 o'clock.

Q All right, and after --

A In the morning. As I recall, I only had one motion that Friday morning, and it did not take long is my recollection, and I got off the bench, I'm going to say I know by 10:00 o'clock.

Q And thereafter what did you do?

A What did I do?

Q Yes. On December the 15th?

A I worked until time to take a flight out to Las Vegas.

Q And do you recall what time the flight was to Las Vegas?

A 12:40.

Q 12:40 p.m.?

A That's correct.

Q Do you recall what airlines?

A Braniff.

Q And did you in fact fly to Las Vegas on the 15th?

A I sure did.

Q Do you recall at or about what time you arrived in Las Vegas on that date?

A 1:45.

Q And where did you go after you got to Las Vegas?

A I went directly to my home.

Q Did you stay at your home the rest of the day?

A No, I did not.

Q Did there come a time that you left your home?

A I left my home and I took my car and had it washed. I drove to the courthouse and picked up my mail, and then I drove over to a friend's home.

Q All right. And how long did you stay at the friend's home?

A Until about approximately 5:30.

Q Where did you go after that?

A Went home.

Q And did there come a time when you left your home that evening?

A Yes, I did.

Q Who did you leave with, if anybody?

A Mr. Jay Brewer.

Q Who is Jay Brewer?

A Jay Brewer is the oldest friend I have in Las Vegas. We met in the early '40's and we have been friends ever since; warm, close friends.

Q Did Mr. Brewer come to your home?

A Yes, he did.

Q Did he come in or did you leave right away?

A He came in.

Q All right. How much time did you spend in your home?

A I would just guess, twenty minutes at the most, because I had called him when I got in and told him that I was in, and Jay had gone with me -- he used to be in the Christmas tree business and I don't think that up until maybe 1980 that I ever bought a Christmas tree by myself if he was in town. And I wanted to get my Christmas tree and that was the main reason for him coming over, but we went to dinner early at the Horseshoe Club and then we went and picked up a tree and I came back to the house.

Q Just so I am clear on this, the flight that you took to Las Vegas from Reno left at 12:40 in the afternoon and you arrived there at about 1:40 in the afternoon; is that correct?

A That's correct.

Q All right. And then you went to dinner with Mr. Brewer; is that right?

A That's correct.

Q And that was at the Horseshoe?

A That's correct.

Q And thereafter you bought the tree?

A That's true.

Q Did you then go home?

A Yes, I did.

Q What time did you arrive home on the evening of December the 15th after having dinner and buying the tree with Mr. Brewer?

A My guess would be it was about 7:30.

Q Then what did you do if anything?

A Started dressing. I had an engagement.

Q What type of an engagement did you have?

A The Lung Association had an affair for Governor O'Callaghan and his lady.

Q All right. And do you recall where that affair was being held?

A The Dune's Hotel.

Q Did you in fact go to the Dune's Hotel?

A I did.

Q About what time did you arrive there?

A I arrived at the Dune's about 8:30, maybe 9:00 o'clock.

Q And how long did you stay there?

A I stayed till it was over.

Q About what time was that?

A Approximately 10:30, I would say, or 11:00 o'clock.

Q After it was over, what did you do?

A I went home.

Q I'd like to call your attention to December the 16th, and ask you whether or not during December the 16th, which was a Saturday, did you have the occasion to go anyplace?

A Yes, I did. I came back to Reno.

Q All right. How did you get back to Reno?

A By plane.

Q Do you recall when you left?

A I think 5:30.

Q In the evening?

A Yes.

Q Why did you come back to Reno?

A I came back to attend a Christmas party at Mr. and Mrs. Drendel's home.

Q Is that John Squire Drendel, the gentleman who has been in court testifying?

A That's correct.

Q And did you in fact go to that party?

A I sure did.

Q Did you see anybody else you knew at that party?

A Stanley Brown was there.

Q All right.

A And his wife.

Q And that's Stanley Brown who has testified in this trial as well, is that right?

A That's correct.

Q And thereafter, did you have the occasion to return to Las Vegas?

A The next morning at 9:00 o'clock.

Q And how did you return?

A By plane.

MR. GOODMAN: May I have this marked, please.

(Whereupon a copy of a plane ticket was marked as Defendant's Exhibit 46 for identification.)

BY MR. GOODMAN:

Q Your Honor, I am going to show you what's been marked for identification as Defendant's Exhibit, proposed

Exhibit 46 and ask you whether you can identify this, sir?

A Yes. That's a copy of the ticket.

Q And that's a ticket which reflects that you traveled on the 16th and the 17th of December of 1978; is that correct?

A That is correct.

MR. GOODMAN: Your Honor, at this time I would move the admission of Defendant's Exhibit 45.

THE COURT: Let it be admitted.

(Whereupon Defendant's Exhibit 46 was duly admitted into evidence.)

BY MR. GOODMAN:

Q During the succeeding months, did you become aware that a motion for new trial or in the alternative for relief under Federal Rule 2255 was filed by Joseph Conforte?

A No.

Q Did you have any occasion to advise either Joseph Conforte or Stanley Brown that a judge from Idaho was going to rule on that case and you would appoint the judge to rule on that case?

A I never at any time told anyone or had any conversation with any living human being about a federal judge from Idaho sitting on any case.

Q Do you know who was presiding over the matters which were heard at the District Court level concerning Joe and Sally Conforte on their tax case?

A When Bruce Hochman filed a motion for a new trial in which they alleged that Judge Thompson was biased and prejudiced against Conforte and should have not heard the case, should have disqualified himself, Judge Thompson naturally could not hear the motion attacking him. And the whole Conforte case then, not just the motion, but the Conforte case was assigned to Judge Warren Ferguson who at that time was the United States District Judge in the Central District of California. And Judge Ferguson had jurisdiction by reason of that assignment over that case for many months, until Judge Ferguson was appointed to the United States Court of Appeals. And Judge Ferguson was the judge of that case at the time that the 2255 Motion as we call it, that is in the alternative also for Motion for New Trial was filed.

Q And do you know whether or not Judge Ferguson decided the 2255 Motion in the alternative, the Motion for New Trial?

A The only reason I know that is because I reviewed the record and he did decide it and he denied it.

Q Were you even aware that such a motion had been filed until such time as you reviewed this record?

A I had no knowledge of it whatsoever. I never heard of a 2255 Motion, did not know it had ever been filed at all in this case until I reviewed the record before this trial.

Q How much before the trial?

A After the indictment.

Q So that's the first time that you ever even became aware that such a motion had been filed?

A That's correct.

Q Now, I'd like to call your attention to the period of time, your Honor, in March 16 of 1979 and ask whether you were assigned to sit in Portland, Oregon?

A I was.

Q When did that assignment take place?

A I believe the 25th of February.

Q Of 1979?

A That's correct.

Q Is it unusual that an assignment takes place where a judge who is, has jurisdiction in the District of Nevada is assigned to sit in another jurisdiction?

A Oh, not at all.

Q Had that happened with you?

A Oh, yes.

Q Over the period of time you have been a judge?

A Oh, yes. I have tried all over the Bonneville Power Cases and Eastern District of Washington, so it's routine. They need a judge to try a case and they call

Judge Browning and say, "We have to have a judge." And Judge Browning assigns some other District Judge to hear it.

Q All right. When you went to Portland, do you recall where you stayed?

A I stayed at the Hilton.

Q And is the Hilton -- where is the Hilton located?

A One block from the courthouse. I think it's on Southwest Sixth Street.

Q How long did you stay there?

A I stayed a little over a week.

Q All right. Do you recall when you left the Hilton?

A I sure do.

Q Could you tell the jury as to how that came about?

A When I checked into the Hilton, I had -- Judge Burn's office had made reservations. He's the chief judge in Portland, and they were only able to get me in there for one week because of a convention and I did not know that until I arrived. And then when I found that out, well, I went and talked to the assistant, I believe he was assistant manager. He could have been the manager of the hotel, and he said, "Well, we have a convention coming in and it is a large convention." He said, "But as always happens, there are a lot of no shows," he called it. And he said, "I think you will be all right. Just stay where you are until you hear differently from me."

I heard differently from him. On the 6th, I went to lunch at the Hilton. I came back and I saw a notice in my box or a note, and of course, I asked for it and they gave it to me and it was a note from the same gentleman that I had talked to saying he was sorry, but they had to have the room.

And it had been put in my box the evening before and I had not seen it or had not called for it and the note said that he would appreciate it if I would vacate by 1:00 p.m. of that day. And this was something around 12:00, I would say about 12:30. So I vacated my room. I went up and I packed and I took my suitcase and suit hanger that I had and went back to the courthouse and left them in my chambers and asked Mrs. Ahlstrom to call Judge Burns and tell him my predicament and see where he could get me in.

They got me in the Portland Motor Inn.

Q When did you know that you got into the Portland Motor Inn?

A My recollection is that I first learned that I was, that I was not exactly where I was, but I took a recess in the evening -- the afternoon rather. I called Stanley Brown, who had left a call there for me, and said it was urgent. I then went back on the bench and some time after

I went back on the bench, the bailiff handed me a note and it was from my secretary and the note said, "You will not have to sleep in the park tonight. We found you a room."

Q At the time you spoke to Stanley Brown, did you know where you were going to be staying, the evening of March the 6th and thereafter?

A I did not.

Q And would you relate to the jury what your conversation with Stanley Brown was on that early afternoon of March the 6th of 1979?

A Well, I said to him, I said -- naturally I said hello and he said, "Joe has -- Joe is out of control and he's going to fire all of his lawyers."

I said, "Well, it's just emotionalism." I said, "It will pass."

And he said, "No, it will not. He means it. He said he's going to fire Hochman for sure."

And I said, "Well," I said, "what can I do about it?" I said, "I can't do anything about it."

And he said, "Well, he has respect for you and he will listen to you. He won't listen to me anymore." He said, "Will you see him if I send him over there."

And I told him, I said, "I'm busy and I'm in this case and I'm playing catch-up." And I meant by that that we had very fine lawyers in that case.

Q Who were the lawyers?

A The lawyer was Clyde Maxwell, one of the most able tax lawyers in the country, and the Justice Department lawyer was a young man by the name of Semino, brilliant lawyer, good lawyer.

Q Who were the parties in that case, Judge?

A Mr. Ben Johnson, who testified in this case, was the defendant.

Q And the United States was the plaintiff; is that correct?

A That is correct.

Q And you were telling Brown that you were --

A I said I was playing catch-up. I mean by that that I was having to work to stay up with them. You know, so that I would know what they were talking about.

I was just too busy to see Joe Conforte or anybody else, and he said, "There will be a catastrophe if he fires Hochman, you understand that?"

And I said, "I understand that." And I said, "All right." I said, "Tell him to come over, I'll see him."

Q And at that point in time, did you tell him to contact you at the Portland Motor Lodge?

A I was not in the Portland Motor Hotel at that time. I am positive of that.

Q From the time --

A I did not tell him that?

Q Pardon me?

A I did not tell him that. I think what I actually told him, "Send him by the courthouse. I'll see him."

Q From the time that you had that conversation with Stanley Brown, until the time that you saw Joe Conforte in Portland, did you tell anybody or did you tell Stanley Brown or Joe Conforte you were staying at the Portland Motor Lodge?

A No, sir.

Q Did there come a time that you saw Joe Conforte in Portland?

A Yes.

Q When?

A I saw him on the morning of the 8th.

Q That would be the 8th of March of 1979?

A That's correct.

Q Do you know where you first saw him?

A Yes, I do. Right outside the steps of the courthouse.

Q You say you saw him right outside the courthouse?

A That's correct.

MR. GOODMAN: May I approach the witness, your Honor.

THE COURT: Yes.

BY MR. GOODMAN:

Q I am going to show you, Judge Claiborne, a series of pictures and ask you whether or not you are able to select therefrom any picture which would depict the area where you first saw Joe Conforte on March the 8th of 1979?

A Well, Exhibit 20 would best portray where I saw him. I first saw him in -- it really is not clear in that -- I think this picture shows within three feet of where I first saw him.

Q Could you put an arrow as to where you first saw him?

A (Indicating.)

Q And the arrow depicts the location from where, about where that first was?

A That's right. Down on the sidewalk, the car hides the sidewalk.

MR. GOODMAN: May I show this to the jury, your Honor?

THE COURT: Yes. Has it been introduced yet?

MR. GOODMAN: I believe Mr. LaRue was the witness. They have been, your Honor.

THE COURT: All right.

BY MR. GOODMAN:

Q After you -- what took place when you saw Mr. Conforte at that time?

A Well, what took place, Exhibit 29 shows where I first saw him.

Q All right. Could you put an arrow there please?

A Complies.

Q Is the building which is depicted -- what is the building depicted in this photograph?

A The courthouse, federal courthouse.

Q The federal courthouse in Portland?

A That is correct.

MR. HENDRICKS: May I see that, please?

MR. GOODMAN: Certainly.

BY MR. GOODMAN:

Q And the arrow depicts where you first saw Mr. Conforte?

A That's correct.

Q What took place when you saw Mr. Conforte?

A Well, I had -- I had come from the Portland Motor Inn, or Motor Hotel.

Q That's where you were staying; is that right?

A Yes, it's two blocks away and I would walk right down the street and I turned on Sixth, Southwest Sixth, I believe the street is, the courthouse is on Main Street facing me, and just as I got about three feet from the steps of the courthouse, I heard someone yelling, "Judge,

Judge!" I turned around and Conforte was running down the walk about where the arrow is on Exhibit 29.

I just waited for him and shook hands with him, and he began to relate to me all of the problems that he had of the evening before, and that he could not find a hotel, and then he was all over the town and so forth, and we walked up the steps and as I walked up the steps, I became aware that the Johnsons were right behind me.

Q Now is that Mr. --

A And another man.

Q Is that Mr. and Mrs. Johnson?

A That's correct.

Q And Mr. Johnson was the defendant in the case over which you were presiding?

A That is correct, and there was another man right behind them, and I was under the impression that he might have been with them.

We all walked up the steps, Conforte and myself slightly ahead, and we turned left into the lobby of the courthouse and walked the length of the lobby, the first floor is a post office, to the elevator. And I pushed a button from the elevator and I turned around and the Johnsons had walked up to the elevator by this time and stopped, and I greeted them. I said, "Good morning," and they spoke back. They said, "Good morning," and the elevator came down, and I stepped back and I said to Mrs. Johnson, "Go ahead," and I could tell by the expression on their faces, they were hesitant whether they should ride up the elevator with me or not, and I said, "It's all right, go ahead."

So she stepped into the elevator, and Mr. Johnson behind her, and Conforte and myself and the other party who was a rather large man.

Q Was Clyde Maxwell with the Johnsons at that time?

A No, no. No.

Q All right.

A We got off the elevator.

Q Did anything happen in the elevator which was unusual?

A He began to smoke a cigar, he was smoking a cigar then before he got on the elevator and he continued to smoke it in the elevator, and I looked over and I saw Mrs. Johnston. She said something to her husband and then she looked displeased with the fact that he was smoking a cigar and I said, "Joe, please don't smoke the cigar in this elevator." He quit smoking it.

Q All right. Do you recall what Joe Conforte was wearing at that time?

A Yes, I do. I do and I don't. I know he had a leather jacket on and I know he had a sports shirt and outside of that, I don't know what he had on.

Q How did he look generally?

A (No response.)

Q How was his --

A He was unshaven, that I recall.

Q All right. Did the elevator then reach the floor where the court proceeding was taking place?

A Yes, it did.

Q What did you do at that time?

A We all left the elevator and we walked the length of the hallway; right at the end of the hallway was the courtroom. And it says Courtroom No. 1 and it is Judge Solomon's courtroom. It is one of the most ornate courtrooms in the country. It's beautiful.

Q All right. Did you go into the courtroom with Mr. Conforte or anybody else at that time?

A No, I turned left at the hallway, right at the front door of the courtroom and walked the hallway, dead-ended, and the entrance to the Judge's chambers was at the end of that little hallway. And I walked down to the entrance to the chambers and I stood there then and I talked to him.

Q Are you able to gather from those photographs which are before you, your Honor, where you were speaking with Conforte in the hallway, in the Portland Courthouse?

A Well, Exhibit 30 shows the front of the courtroom and it shows the hallway to the left and Exhibit 31 shows the hallway.

Q Are you able to depict where you and Mr. Conforte were standing?

A Yes. Do you want me to write on it?

Q If you would be kind enough to do that. If you would put "J" for judge and "C" -- well, no that's no good. J.C. would be confusing.

A I will put HEC and JC; how's that?

Q That's better.

THE COURT: That's on Exhibit 31?

MR. GOODMAN: Yes, your Honor.

BY MR. GOODMAN:

Q At the time that you were speaking with Mr. Conforte, did there come the occasion for you to do anything with a business card?

A Yes.

Q I am going to show you what's been introduced into evidence as Government's Exhibit No. 57 and ask whether you recognize this particular document?

A Yes, I do.

Q What is it?

A It's my professional card when I was an attorney.

Q And when was the last time you saw it?

A (No response.)

Q Prior to this court proceeding?

A The last time I saw it was when I was talking to Mr. Conforte.

Q How did it come about that you saw it at that time?

A Because I wrote my Reno phone number on the back of it.

Q And where did you do that? Was that in the courthouse in Portland?

A In the hallway.

Q In the hallway?

A Yes. On the wall.

Q As depicted in Defendant's Exhibit No. 31?

A That's correct.

Q Could you tell the jury what took place between you and Mr. Conforte when you were speaking in the hallway at the Portland Federal Courthouse on March the 8th of 1979?

A Well, I walked, he is still talking about his, the terrible night he had, all the way down the hallway. And I stopped. I did not want to take him into the chambers.

Q Why?

A Not because I didn't want anybody to see me with him. I had work to do. We were starting at 9:00 o'clock that morning, it was the only day that we, except the day the jury came in on Saturday, that we started at 9:00. I had work to do and I pulled the old lawyer trick that we all know that if once you sit down in your office with someone, it seems you never can get rid of them.

It was just a time factor with me, for no other reason. It wasn't that I was, that Joe Conforte had a bad reputation; I didn't want to be seen with him. I mean, I am not a hypocrit. He was good enough for me to take his money when I was representing him, so it certainly, he was good enough for me to be seen in public with.

So even despite his bad reputation and that is a decision you make before you represent a person in a case. I just didn't want to get in there and get bogged down listening to him because I had things to do.

Q What did he say to you in the hallway then?

A He said to me, he started out by saying, he said, "I would like the name of the lawyer in Arizona that you told me about who was a good man on appeals." And I told him, I said, "Well, his name is John Flynn," and he said, "Where is he?" And I said, "He's in Phoenix."

And he said, "Well," he said, "I am going to hire him."

And I said, "Well," I said, "You're making a big mistake." I said, "What's wrong with Bruce Hochman?"

He said, "I don't like him, I hate him." He said, "I wouldn't be here in the situation that I'm in now if it hadn't have been for Bruce Hochman." He said, "He talked me into waiving the jury." He said, "The jury would have acquitted me."

He said, "I'm in the situation I am in now because of Bruce Hochman."

I said, "That is not true." I said, "I was present when the decision was made." I said, "We all agreed to waive the jury. It was not Bruce Hochman's decision alone." I said, "We all jointly reached that conclusion."

I said, "And including you."

And he said, "Well, I agreed to it because I was pressured by Hochman."

And I said, "Well, that isn't true. You weren't pressured by anyone, because you said over and over and over, 'Thompson's my friend. He turned me loose once, he will turn me loose again.'"

And I said, "You can't do that." I said, "You have the best lawyer, the best tax lawyer in the country, I believe." And I said, "He will do you a good job."

He said, "No, I want a laywer that's got," he said, "that's really will make those judges in the Ninth Circuit listen to him." He said, "I know all about you judges." He said, "Some lawyers you listen to, some lawyers you won't listen to." He said, "I want a lawyer that those judges will listen to."

I said, "Well, nobody knows who the judges are going to be that's going to sit on your case." And I said, "How in the world would you go find a lawyer that all 20 judges over there," I said, "would listen to." I said, "That's ridiculous." I said, "They will listen to Bruce Hochman, whoever is on the panel." I said, "He's a brilliant lawyer, a good lawyer," and I said, "They will listen to him."

And he said, "Well, he treats me like dirt." And he said, "I don't like any man to take my money and then treat me like dirt." He said, "I have paid him a half a million dollars," and he said, "he treats me like dirt."

Well, I knew that wasn't true because I had knowledge of what Mr. Hochman's fee was, but I didn't say anything. I said, "Well," I said, "stay away from him. He doesn't need you. Just stay away from him and let him do his job. That's the best thing you can do for yourself." I said, "The trial is over." I said, "The Ninth Circuit is going to make their decision based upon the record of what happened at the trial. So he doesn't need your input."

I said, "So just stay away from him and let him do his job." I said, "If you will stay out his hair, I'm sure that he won't treat you like dirt."

And that seemed to satisfy him. He sat down. "How do you think we are going to come out?"

I said, "I don't have any idea." I said, "I haven't read any of the briefs but my own." I said, "I am only familiar with the brief that I wrote myself." I said, "But I would venture a guess that you are going to do all right."

He said, "Will you read the briefs and let me talk to you about the matter?"

And I said, "Yes, I will do that." I said, "When I get back," I said, "I will get the briefs, I will read them, and I will tell you what I think about the briefs."

I did.

He said, then he started telling me that he was in contact with a Congressman.

Q With a Congressman?

A Yes. He didn't say anything about Mr. Rothman or anybody else. He said that he was in contact with a Congressman, and that it was going to cost him a half a million dollars, but he -- this Congressman was rewriting all of the tax laws and he was going to write the penalty out of the section under which he was convicted.

And I said, "You're crazy." I said, "It isn't going to help you one bit." I said, "It won't help you anyway. You are wasting your money for goodness sake."

I knew in my own mind that he wasn't paying anybody any $500,000 to help him rewrite the tax laws.

And I said, I took just a minute or two and told him what I thought about what effect it would have on his case which boiled down to a bottom line of nothing. And he left.

Q He left the hallway?

A That's correct.

Q All right. During the period of time he was with you on that morning, did he ever give you any money?

A No, sir.

Q And after he left, did you see where he went?

A Joe Conforte did not say a single thing to me in the entire conversation, either remotely suggesting anything unethical or anything wrong or anything illegal. Not a thing.

Q After he left you, did you see where he went?

A I really can't say I did because I was standing with my back against the wall closest to the chambers door, and I reached up and I got the phone so that they could know I was there and pushed the buzzer which released the lock on the doorway, and announced that I was there and the buzzer rang and I pushed the door open and he was -- he had turned around and he was walking away.

Q Do you recall what time he walked away from you?

A I would say 20 minutes till 8:00.

Q Till 8:00 in the morning or till 9:00?

A I mean till 9:00; twenty till 9:00.

Q Do you recall what time court started that morning?

A 9:00 o'clock.

Q And that was the continuation of the case of United States vs. Johnson; is that correct?

A That's correct.

Q Thereafter, after that case was decided, did you have an occasion to speak with Stanley Brown about your conversation with Joe Conforte?

A I did.

Q When did that take place?

A The next time that I was in Reno, it would have been the latter part of March.

Q Of 1979?

A That is correct.

Q And where did it take place?

A We were at lunch.

Q Do you recall where?

A A Chinese restaurant a good distance out. And I really don't know the street, but I believe out across

Kietzke in that direction somewhere.

Q Are you able to recall what your conversation was about?

A Well, it was a very short conversation about the Conforte conference. He said, "Thanks for seeing Joe." And he said, "You straightened him out, I guess." He said, I believe he said, "out of the country." He may have said, "He's in Europe," I don't know, but he's out of the country.

And I said, "Well," I said, "He was about to make a fatal mistake."

He said, "Yes," and that was all the conversation there was about it.

THE COURT: Let's take a midmorning break at this time, ladies and gentlemen.

(Whereupon a recess was taken.)

THE COURT: Call the jury, Mr. Marshal.

All right, Mr. Goodman, all jurors are present.

MR. GOODMAN: Thank you, Judge.

BY MR. GOODMAN:

Q Judge Claiborne, I'd like to take you back to your conversation with Mr. Conforte in the courthouse hallway in Portland on March the 8th of 1979 and direct your attention to the incident concerning your professional card. Do you know, sir, where that card came from, when you saw it that day?

A Mr. Conforte pulled it out of his billfold.

Q Do you know how he received it?

A Yes. You mean the exact time he received it?

Q The best you could tell us.

A I don't know. I would venture a guess at he may have received it about the time that we were discussing the motion for new trial.

Q Now, calling your attention to the month of May of 1979, do you recall whether or not you were advised that the Conforte appeal had been argued in the Ninth Circuit?

A Yes.

Q How did you become aware of that information?

A Stanley Brown called me.

Q When?

A I don't know.

Q Was it before or after?

A Immediately after, I presume, from listening to him testify that it was immediately after the, he got information that the Ninth Circuit had affirmed Judge Thompson.

Q Was there a time that you spoke to Mr. Brown at or about the time that oral argument was heard in the Ninth Circuit?

A Yes.

Q And would that have been at or about the time of May the 16th of 1979?

A Yes. I think it would have been the 17th.

Q All right. Do you recall where you spoke with Mr. Brown?

A In Reno, Nevada.

Q Can you think of the specific location?

A I am sure that we were having lunch at the Continental Lodge.

Q Do you know how the meeting or the luncheon was arranged between yourself and Mr. Brown?

A He called me.

Q And did you set up a time to get together to have lunch on that date?

A We did.

Q And at the luncheon, was there any discussion about the Court of Appeals argument between yourself and Mr. Brown?

A Yes.

Q And do you recall what was said?

A Well, he was very happy, he was elated and he was telling me how well things went. He expressed that it was, that the Ninth Circuit was, that the panel was, it was a cinch that they would reverse and he began to talk about Judge Palmieri's attitude towards the case and that he was very hard on the Government lawyer.

Q Did you know who Judge Palmieri was?

A That was the first time I ever heard of him.

Q Did you ask Mr. Brown who he was?

A Well, yes, during the course of the conversation, because he wanted to know what I knew about the disposition of the various judges on the panel and Judges Kennedy, Tang and Palmieri, and I said to him, I said, "Who is that? Where is he from," and I thought maybe it was a District Judge sitting on the Circuit and that I didn't know. Maybe someone newly appointed. He said -- I said, "Where's Palmieri from?"

And he said, "New York."

And I expressed at that time, I said, "What's he doing on the panel?" I thought that was unusual, and then I found out in a matter of months that that wasn't unusual at all, that it was a very, very common practice.

Q Did Mr. Brown ask you about the type of judges each of these judges who were on the panel were?

A He did.

Q And did you respond?

A I sure did.

Q What did you tell him?

A I told him that Judge Kennedy, in my opinion, was one of the most brilliant men I had ever met. That he was a highly intelligent and knowledgeable judge. That I also thought that he was fair, and that he was what you called a law judge, that he's going strictly by the letter of the law and I expressed to him that Judge Tang I knew and I related an experience that I had when I was first appointed and went to the sentencing institute and I was new, and in fact had been a federal judge, I think, three days and I felt somewhat out of place and strange, and he must have sensed it, and because he came over to me and introduced himself, went and got his wife and introduced her to me. He then took me from judge to judge and introduced me to all of them, invited me for lunch, took me to lunch with two other federal judges and he went out of his way to make me feel comfortable. I shall always love him for that, and I told Stan Brown about that.

I said -- so I said he would seem to me a very compassionate man, and so that's all I knew about him.

Q Was there any further discussion about Judge Palmieri? At that time?

A None at all.

Q Basically was that the essence of your conversation with Mr. Brown after the matter had been argued at the Ninth Circuit?

A Well, not necessarily. I told him that, he was very happy about how it went and I said to him, I said, "Well, you can't tell anything from that, about that." I said, "Many times I get on the bench and there's arguments on matters and I take positions," I said, "that is not the same position that I take when I write decisions." I said, "Many times," I said, "judges on the bench," and I said, "become devil's advocates." I said, "They want to see just exactly how much a lawyer knows about the subject matter and the questioning can become very intense in that regard." I said, "So you can't tell a thing in the world about the judge's attitude," I said, "in listening to arguments."

I said, "If that's what you're basing your elation on," I said, "you better forget it." I said, "I know Judge Kennedy well enough," and I said, "I think Judge Tang well enough," I said, "that the decision is going to come down based upon what they actually believe the law is and nothing else. No other consideration."

Q Now, I'd like to call your attention to a time shortly thereafter at or about June the 4th of 1979, and ask whether or not you received a phone call from Joe Conforte on that date?

A What date?

Q June the 4th of 1979?

A No.

Q Were you in San Diego on that date?

A No, I was not.

Q On June the 4th of 1979, what were you doing?

A On June the 4th, I was at my daughter's home in Burbank. I had gone down on Saturday night and I stayed with her until the 4th. I got up that morning, I drove her to work and I drove to Pasadena to sit on the Ninth Circuit Court of Appeals.

Q Did you in fact sit on the Ninth Circuit Court of Appeals that day?

A I did.

Q And did you at any time on that day speak to Joe Conforte?

A No, I did not.

Q The next day to which I would like to draw your attention, your Honor, is April the 30th of 1980, a day that on or about the decision of the Ninth Circuit Court of Appeals in the Conforte case came down.

Do you recall receiving a phone call from Stan Brown at or about that time?

A Yes.

Q Where were you when the phone call was made to you?

A In my office.

Q And do you recall what was said -- well, first of all, when was the phone call made? Was it on April the 30th of

1980?

A April 30th.

Q April 30th of 1980 was the date that I believe the Ninth Circuit decided the Conforte appeal. Do you recall getting a phone call from Stan Brown on that date?

A No. I seem to recall the date the decision came down, and I'm not sure it's April 30 or not, but I learned about it from Stanley Brown. He called me at my chambers and he said, "I have just got information that the Ninth Circuit affirmed Count VII, remanded the three remaining counts back for resentencing," and then he said, "Can you give me the rule for rehearings in the Ninth Circuit."

And I said, "No, I can't." And I grabbed the Ninth Circuit Rule and I began to thumb through them and I said, "I don't see them handy, but," I said, "I think you have two weeks." Anyway, that ended the conversation.

Q And thereafter did you have the occasion to speak with Stanley Brown about Mr. Conforte or Mr. Conforte's problems up until December of 1981 when Stan Brown --

A In late fall, 1979, after I had completed my assignments in Reno and Judge Reed had taken the bench here. I received a phone call from Stanley Brown asking me if he could come down and see me and I said, "Well, certainly."

Q Was that, "Come down to Las Vegas and see me"?

A Yes. And he came down. I mean there might have been more conversation than that, but he came down to see me.

Q This was before the Ninth Circuit decided the Conforte case?

A That's correct, and he walked in the chambers and we set down. He was waiting, I think, when I came off of the bench, and I think it was a luncheon break, I'm not sure about that, a good while ago, and he said, "I want to talk to you about Joe and Sally's case." He said, "We are going crazy." He said, "This thing was argued in May and we still don't have an opinion." He said, "What in the world do you think is taking all this time." He said, "I know you have been sitting on the circuit and you know how it works," and he said, "Can you give me any suggestion about what might be going on?"

And I told him from my experience on the circuit that when the panel hears arguments in the case, a conference is held immediately after all of the arguments and all of the cases they hear and they take up the cases one by one.

And if all of the judges are in agreement as to the outcome of the case, well, then one of the panel of three is selected to write the opinion for the Court. Then he goes home and he writes the opinion. And then he circulates it to the other panel members for any changes or suggestions that they might have.

And I told him, I said, "If there are serious points of law that any member of the court might have some feeling of doubt about or want to check further into the case before he ventured an opinion," I said, "then that is put aside and they take up another matter." And I said, "Then the undecided cases," I said, "they circulate memorandums about them among the court. The judges express to each other how they think the case should go and eventually most always, with rare occasions, there's a dissent. They finally come into agreement. And then one of the judges is selected to write the opinion and it is written."

So I said to him, "This long period of time would indicate to me that the Court is not in agreement; from my experience I would say that they are not in agreement," and that was all the conversation there was about the Conforte case.

Nothing else was talked about as far as, you know, our own -- we had a very friendly relationship. We talk about everything, our family, our children, what they were doing, the progress that they were making in their lives and so forth and so on, like all fathers and mothers.

Q And then after that conversation, you already testified that the Conforte decision came down on or about April the 30th of 1980.

After that, Judge Claiborne, do you recall whether or not Stan Brown made another visit to you?

A He made three trips. That's all. Ever. To see me.

Q You are talking about three trips?

A To Las Vegas.

Q Did he ever visit you in La Costa?

A He never visited me in La Costa, he never saw me in San Diego and there never was a conversation with him in my life about meeting him in Southern California. He met me three times, the one I have just related is the first meeting that he had, the second one was after the Ninth Circuit had ruled, he came down, he called me and he said, "I have to see you." And he said, "Will you see me?"

And I said, "Certainly." He came down and he told me that he was told by a credible source that Judge Hug was writing an opinion, had written an opinion in a case called United States vs. Sibla, and that that case would have decided Conforte and that if the opinion had stayed the same, that Conforte would have -- the Conforte case would have been reversed and then he said that he was reliably informed by an individual he would not name, that then Judge Thompson went to Judge Hug and got Judge Hug to change his opinion which Judge Hug did, so that Conforte would not be reversed.

Q That's what Brown was telling you?

A That's what he's telling me.

Q Okay.

A And he said he wanted me to check and see if that happened. And I said Stanley Brown was paranoid about Judge Thompson, and I said, "Stanley," I said, "for goodness' sake, do you think I am going to become an investigator for you, and I am going to get mixed up in what's going on in the Ninth Circuit Court of Appeals between Judge Hug and anybody else?"

I said, "You've got another thought coming. My mother didn't raise any fool." And I said, "The members of the Ninth Circuit are sitting, leaning over my shoulder every day of my life," and I said, "I am certainly not going to be fooling around and making an investigation that pertains to the Ninth Circuit Court of Appeals."

Q All right. And then did there come a time when Stanley Brown visited you again in Las Vegas?

A He sure did.

Q How did that come about?

A Well, that was December the 4th as he said.

Q Of what year? 1981?

A 1981.

Q Was that -- how did that come about that he came to see you at that time?

A Well, he called me and he said, "I want to see you on a personal matter. I have to come down and talk to you. I have to see you." And he said, "It's personal."

I said, "Come on down." And he did. And he truthfully related -- we went to the Golden Nugget for lunch, he came in and he sat down in the back of the courtroom. My secretary had gone to the airport to pick him up, and he came in and he set down and as I recall and he went to lunch. And we did not walk as he said. We drove, and we went, while we were in -- after we got seated, he said, "I'm separated from my wife. I'm sleeping in a sleeping bag in my office." He said, "I don't have money enough to rent an apartment." He said, "I have never been so miserable in my whole life."

He said, "I have never had the big case like you and Pete and John." He was talking about Pete Echeverria and John Drendel. All of us were close friends, the four of us together. And he said, "I have never had the big case like you," and he named the rest of the fellows.

He said, "Joe is my economic survival," and he said, "I have to have him back. I've got to get him back." He said, "And he wants to come back." He said, "I know that you know more about the criminal statutes than any man in the country." He said, "I know that you can tell me how to do it."

And I said, "Stanley," I said, "nobody can help. Nobody can help this man." I said, "He's a fugitive." I said, "No one can help a fugitive," I said, "because no one will listen to you." I said, "The first thing anybody's going to say to you in a position of authority that could conceivably help him is say, 'Hey, when he surrenders, I'll talk to you.' Nothing can be done for him unless he surrenders."

And I said, "And I don't know what you could do for him then," I said, "frankly." And that was all the conversation there was about Joe Conforte. There was no conversation about federal judges calling me and saying the FBI had been to see them. No such conversations as that.

Q After that luncheon took place, was the next time you heard from Stanley Brown in April of 1982 when he called you on the telephone?

A Mr. Goodman, I don't know. As I have told you, on the 13th of December, I received a call. I believe it was Stanley Brown. I am not positive it was Stanley Brown. It sounded like him. But I honestly could not understand a thing he said. So I would have to say positively that's the last time until April the 30th that I am sure that I talked to Stanley Brown. Let's put it that way, Q During the course of trial, you have heard certain conversations which were played to the jury where Mr. Brown spoke with you on April the 5th and April the 13th of 1982. Do you recall those?

A Yes, I do.

Q Do they accurately reflect the subject matter of those conversations?

A They are accurate.

Q And then on April the 30th of 1982, did you come to see Stanley Brown?

A Yes, I did.

Q How did that come about?

A Well, he had called me on the 6th of April and then again on the 13th and he's telling me that the investigatio is really boiling over, and that the FBI agents are running up and down the canyon and that they had been in to see him and the various things. And on each of those cases, he had called and left word and one time he said for me to specifically call him at a specific time, which I did, 12:15 or 12:30.

Q So in other words, you were returning his phone call?

A Yes, sir. And he was advising me that the investigation was going on. I knew, of course, that because I mean everybody in the state of Nevada knew that there was an investigation of some kind involving me and that Conforte was involved and it began as early as the January before that in newspaper columns. But I did not know and apparently no one else knew what Conforte was claiming I did wrong.

Brown called me to tell me that he was, his records were looked at and his records checked and I could not understand why they would be looking at Stanley Brown's records, and I simply said, "You never collected any fees from Joe Conforte for me. You never paid any Joe Conforte attorney fees to me." And that was because I could not understand why they would be looking at his records.

He'd have nothing on record concerning me and Joe Conforte. And then of course, he brought into the conversation the fact that I had met Conforte in Portland and naturally I did not know that he had joined Conforte and was supposed to be the corroborator of all the Conforte storey.

Q You didn't know at that time of the conversation that he was an, acting in an undercover capacity?

A Of course not. He kept saying, "Harry, I want to help you. I want to help you, Harry. I am trying to help you." And he kept on -- both occasions, he wanted to come down and see me. He wanted to talk to me, and I on both occasions, I said, "Come on."

Then I heard nothing from him and so I came to Reno to see Mr. Drendel and I went over to his office and went in.

THE COURT: What year are we talking about now, Judge?

THE WITNESS: We are talking about April the 30th, I think, of 1982.

THE COURT: All right.

BY MR. GOODMAN:

Q At that point in time, was Mr. Drendel your attorney?

A That's correct.

Q And had you hired him to represent you concerning the investigation?

A That's correct.

Q And that was, you indicated that was one of the purposes that you came up to Reno for on April the 30th of 1982?

A That's correct.

Q Did you see Mr. Drendel before you went to Mr. Brown's office?

A Yes, I did.

Q Where did you see Mr. Drendel?

A In his office.

Q And then after you saw Mr. Drendel, what did you do?

A I went over to Stanley Brown's office and I went for the sole purpose to find out what was going on. And I walked in and I waited about, not over ten minutes. His secretary said, "I'll tell him that you are here right now," and I said, "Never mind, I've got plenty of time."

He came out with a fellow in Reno by the name of Charlie Mapes, used to own the Mapes Hotel. And I shook hands with Mr. Mapes and shook hands with Stanley and I said, "I want to talk to you."

And he began to -- his eyes began to dart from place to place like he was, had indecision where he was going to talk to me.

I didn't know, of course, that his office was bugged, you know. And he could not take me into his office because his office was bugged and I would see him turn his machine on.

So he finally said -- grabbed me by the arm and said, "Come on, we'll go upstairs." We walked upstairs and he, the upstairs portion of his, the building rented to another lawyer whose name I don't remember and don't know, but he stuck his head in this lawyer's office and said, "I want to use your conference room." So we go in and he sits down, but I don't. I stand up. I said, "I want to know what is going on." I said, "I want to know what Joe Conforte says I did wrong."

I said, "That's all I am here for, Stanley." I said, "I know you know." I said, "I have known you for 35 years and I know that you're Joe Conforte's lawyer for 25 and I know that he doesn't make a single move unless he discusses it with you in advance," and I said, "you have knowledge about what he's about to do and it has been fully discussed between the two of you." I said, "I know you know what this is all about."

And he said, "I swear to God, Harry, I do not know."

I said, "Stanley, I do not believe this." I said, "You have got an office full of Joe Conforte's cases. I do not believe that."

I said, "How do you communicate with him?"

He said, "Through Peter Perry."

I said, "I don't believe that." I said, "I believe you know what he's doing. I think you know how he is involving me, and I know -- I believe you know what he's claiming that I have done wrong."

He said, "I'll swear to God I do not know." He said, "I am half out of my mind." He said, "I can't sleep or I can't eat. This thing is driving me crazy."

I said, "Stanley, why can't you eat or sleep? You're not involved in this thing." I said, "Are you?"

He said, "No, I am not that I know of."

I said, "Well, why can't you sleep or eat?" I said, "I sleep. I eat." And I said, "I'm the one." And I said, "I understand that he's claiming that I did terrible things. I'm the one he's claiming I did terrible things."

And he said, "Because I'm between a friend and my best client."

I said, "Well, Stanley, if you know you are between me and Joe Conforte, then you know what it's all about. Because if you didn't know what it's all about, you wouldn't know you were between me and Joe Conforte."

And he said, "Please leave."

I said, "What?"

He said, "Please leave."

And I said, "We have been friends 35 years. Do you know what you are doing? You're telling me to leave."

He said, "I'm sorry." He said, "I'm sorry. I'm not strong like you. Please leave."

I said, "All right." We walked down the stairs and we get to the front door and he says, "Harry, please don't come around here anymore."

And I said, "This is great. First you tell me to leave," and I said, "now you tell me not to come back anymore."

He said, "I'm sorry." He said, "This place is crawling, absolutely crawling with FBI agents."

THE COURT: All right. Next question.

BY MR. GOODMAN:

Q Judge Claiborne, after you had that conversation, what did you do?

A I went back to John Drendel's office.

Q And what happened when you got to Mr. Drendel's office?

A I was angry and my pride was wounded and I was hurt.

Q Did you express that to Mr. Drendel?

A I sure did.

THE COURT: Well, what happened the question was.

THE WITNESS: We went for a drive. We drove around town until I could, you know, collect myself and then he took me to the airport and I returned to Las Vegas.

BY MR. GOODMAN:

Q At any time thereafter, did you ask John Drendel or Pete Echeverria or anybody else for that matter to contact Stanley Brown on your behalf?

A I did not. They contacted me on several occasions and relaying messages from Stanley Brown that he wanted to see me, and I told him I did not want to see him.

Q Was there a suggestion in any of those conversations that you meet with Stanley Brown in the desert?

A Yes.

Q Who conveyed that idea to you?

A Mr. Drendel.

Q What did he say to you?

A He said that Stanley Brown called him and said that he wanted me -- he wanted to fly his plane into a dry lake or desert area near Las Vegas, preferably Death Valley and for me to meet him there and so that we could discuss the Conforte matter. And I told John Drendel, I said, "You tell him I am not meeting him on the desert or on a dry lake. I'm not holding any rendezvous with he or anybody else, that I will meet him in my chambers. I will meet him in his office, or anywhere else, but I am not holding any rendezvous."

Q Did there come a time when you had a meeting with Stanley Brown after that conversation?

A July the 2nd. My birthday.

Q And that was July the 2nd of 1982?

A That's correct.

Q Where did the conversation take place?

A In John Drendel's office.

Q Do you know how Mr. Brown came to be there?

A Yes, I do. I came in to see Mr. Drendel. We rode in on the same plane from Las Vegas and we got to his home, I spent the night with him and I called Stanley Brown and said I was there and if he wanted to talk to me that I would be in his office the next morning at 9:00 o'clock.

Q Were you in fact at Mr. Drendel's office at 9:00 o'clock the next morning?

A I sure was.

Q Did you meet with Stanley Brown?

A Well, he showed up.

Q All right. Do you recall what room you and Stanley Brown had a conversation in?

A We met in the conference room of Mr. Drendel's law office.

Q Could you describe that room at that time?

A It's a bare paneled office with shelves on the end, a couple of shelves on the end with about three or four law books on each shelve and a table and chairs.

Q Did you have any legal pad with you, such as this at the time?

A Absolutely not.

Q Did Mr. Brown have a legal pad with him?

A No, sir, there wasn't a sheet of paper in the whole room.

Q What took place between you and Mr. Brown?

A When he came in, I was standing in the hallway with Mr. Drendel and he came and he hugged me. And he said, "I hear you have been ill." And I had had an attack of pancreatitis, and that surprised me because I didn't think anybody knew about it, I hadn't lost any work and no one knew except my doctor and myself.

And I said, "Yes, I have been. But how did you know?"

And he said, "Well, I don't know, but I heard that you weren't feeling well."

"Well," I said, "I am pretty good now. I'm okay."

And he said, he leaned forward in his chair, he was sitting at the end of the conference table and I was sitting to his right, and he leaned forward like this and he said, "Harry, Joe swears that you have done business with him."

And I said, "Who does he swear that to? You, Stanley?"

And he said, "No."

I said, "Who does he swear it to?"

He said, "Well, um," he said, "I understand that, um, I understand that he's, um, told the FBI."

And I said, "But he doesn't swear it to you; is that right, Stanley?"

And he said, "No, no, no." He said, "No, not really."

I said, "What does 'not really' mean? That you have talked to him? That he's told you some things, but he hasn't said that he's done business with me; is that what you are talking about?"

He said, "Well, no." He said, "I mean from what I have heard that he swears up and down that you took money from him."

I said, "The question, Stan, is, did he tell you that?

And he said, "No, he didn't."

I said, "Well, do you believe it?"

And he said, "Of course, not."

I said -- then he hesitated before he answered, and I said, "You hesitated, Stanley. Is there some doubt in your mind that you think that Conforte may have given me money to do something?"

And he said, "No, no."

I said, "All right. I have traveled a long distance. You have been sending word to me," I said, "now for a long time that you wanted to see me. What is so important?"

He said, "Well, I have appeared before the Grand Jury twice and I have testified six and one half hours."

I said, "Six and one half hours?"

He said, "Yes."

I said, "My God, what could you possibly have known about anything that would take you six and a half hours to tell?"

And he said, "Well," he said, "they subpoenaed all my telephone records, calls that I made out. They subpoenaed all of my office records of the Conforte file." He said, "They asked me all about your relationship with Conforte, my relationship with Conforte, my relationship with you and both of our relationships with Conforte." And he said, "And I am going to have to go back, again."

And then he said again, "I want to help. I want to help you." And he said, "What can I say? What can I say when I go back that will help you?"

And I looked at him and I felt -- I felt -- I thought, "Oh, boy, there's something wrong." Nothing happened, but I had a sense, a sense of danger. I said, "Stanley, the best way that you can help me is to tell the truth."

I said, "I haven't done anything wrong. Joe Conforte never gave me a quarter in his life to do anything outside of attorneys fees." I said, "I have never been involved in any illegal activity with Joe Conforte," and I said, "I have nothing to hide."

I said, "Tell them the truth about this" -- and I won't use the language -- "no good, when you go over there. Tell them the truth about it because nobody knows this man better than you know him."

I said, "You know him from the inside." I said, "That's the best way you can help me."

And he said, "Well, I'm worried."

I said, "What are you worried about?"

He said, "I am worried about what you told me that Judge Kennedy told you he was going to reverse the case."

And I said, "That's a damn lie. I never told you any such thing. I never had a conversation with you in my life even close to that."

He said, "Oh, yes you did. I told my mother. I told my wife. I told my son. And I told Joe Conforte."

I said, "Stanley, I didn't tell you any such thing. What is going on?" And about that time, he grabbed himself (indicating) and he ran out of the room.

Q Then what happened?

A Then John Drendel came into the room, and he came back in, and about five minutes and John said hello.

During this period of time, briefly, when we were talking, John Drendel's law partner had come in and said hello to both of us. He came back in and Stanley said to me, "Did you hear that noise?"

I said, "No, I didn't hear any noise."

And he said, "Some noise went off out there." He said, "Sounded like one of the secretary's recorders went off."

I said, "I didn't hear it." I didn't hear it.

And then he said, "Well, I guess we about talked everything out."

And I said, "Well," I said, "you haven't told me anything, Stanley." I said, "You keep wanting to see me." I said, "I was under the impression you wanted to tell me about what Conforte was claiming I did."

And he said, "Well, I really don't know. I really don't know because he said I legally don't know, but I'll tell you what I think about the whole thing." He said this hum-hawing around. And then he said, "Harry, you are in a lot of trouble."

Q Then what happened?

A We walked outside, and he then took his hands and he tapped me in the stomach like this, and he said, "Hang in there." He said, "Hang in there." He said, "I'm with you."

Q Did he then leave?

A He left.

Q Have you seen Stanley Brown or spoken with Stanley Brown from that date on July the 2nd of 1982 up until the time you saw him testifying in court here?

A No.

Q Do you know a gentleman, Judge Claiborne, by the name of Roy Woofter?

A Yes, I do.

Q Who is Roy Woofter?

A Roy Woofter is a young man that I have known since he was this high (indicating).

Q Do you know what he does for a living at this time?

A He's a lawyer.

Q Do you know whether or not he ever had a relationship with Joe Conforte?

A Very close.

Q Did there come a time, Judge Claiborne, that Roy Woofter came to see you in the fall of 1981 about Joe Conforte?

A Yes, he did.

Q Where did he see you?

A In my chambers.

Q How did that come about?

A He came over and asked to see me and my secretary came in and asked me if I would see him and I said sure.

Q At that time did you know what he wanted to see you about?

A No.

Q Did your secretary let him in to see you?

A Yes.

Q Did you in fact visit with him?

A Yes, I did.

Q In your chambers?

A Yes.

Q What was said?

A Well, we talked about a lot of things. He's a sports fan. We talked about baseball and sports in general and a lot of other things and in the course of conversation, he said, "I have been retained by Joe Conforte."

And I said, "Oh?"

And he said, "I'm going to see if I can do what I can do for him."

I said, "Well, is he"--I said, "Does he want to come back? Is he coming back to the country?"

And he said, "Yes," he said, "he wants to come back." He said, "I'm going to do the best I can do get him back." He said, "What I would like for him to do is just come in and surrender," and he said, "take him into the judge, whoever would be handling it." He said, "I presume it would be Judge Reed, wouldn't it?"

And I said, "I'm not sure of that." I said, "I think the case went back to Judge Reed," I said, "when Judge Ferguson was appointed to the Ninth Circuit Court of Appeals." And I said, "That's probably where he would be."

And he said, "What I would like to do is just take him in and get him sentenced on those other charges," and he said, "maybe resentenced on Count I," and he said, "go on and let him take his medicine and get it over with." He said, "I'm sure," he said, "the sentence won't be too harsh, in view of the Ninth Circuit ruling."

Q Did he ask anything of you?

A Yes, he did. He said, "If I do that," he said, "if it comes down to that," he said, "would you be willing to talk to Judge Reed and tell him what you know about the case?"

Q What did you say?

A And I treated him the same way that Judge Kennedy treated me. I looked at him and I -- but I smiled, and I said, "I don't see how I could ethically do that, Roy."

And that ended the conversation and there never were anymore conversations about it in the future.

Q Did you have the occasion, however, Judge Claiborne, to speak with Roy Woofter in 1982?

A Yes, I did.

Q Where did that conversation take place?

A It took place in the Horseshoe Club in the Horseshoe Restaurant.

Q How did that come about, if you know?

A I don't know how it came about. I don't recall how it came about. I think it was an accidental meeting.

Q And do you recall what the subject matter of the conversation was between you and Mr. Woofter?

A Yes. It was, he was talking about that he had been subpoenaed to appear before the Grand Jury.

Q And did he say anything in particular about that?

A Yes. He said he did not know why he was subpoenaed.

Q Did you say anything in response to that?

A I told him that, "Well, I certainly didn't know."

He said, "Well, I don't know." He said, "I don't know anything about this case."

And I said, "Well, they must think you do." And I said, "Otherwise they're not going to subpoena somebody that knows nothing about the case."

Q Did you tell him how to testify in front of the Grand Jury?

A I certainly did not.

Q Did you tell him what to say in front of the Grand Jury?

A I sure did. I said, "I want to tell you something right now, Roy." I said, "What I am telling everybody, all of my friends," I said, "is this." I said, "Don't try to help me. Don't try to help me. Just tell the truth. That will help me the most. Just tell the truth. Don't try to help me." That's all I told him.

MR. GOODMAN: Judge, I am going into an entirely new area if this would be a convenient time for a break.

THE COURT: All right. Members of the jury, I will excuse you at this time until 1:30. Please do not discuss the case with anyone, nor permit anyone to discuss the case with you. And likewise, do not confer between yourselves about the case. You may be excused.

(Whereupon the jury was excused.)

THE COURT: Judge, you may be excused. Court will be in recess until 1:30, gentlemen, unless you have something else?

(Whereupon the luncheon recess was taken.)

THE COURT: We are ready to proceed. All right, Judge, if you would resume the stand.

Call the jury, if you will.

(The following proceedings were held in open court before the jury.)

THE COURT: All members of the jury are present.

All right, Mr. Goodman.

MR. GOODMAN: Thank you, Judge.

BY MR. GOODMAN:

Q Judge Claiborne, I'd like to ask you a couple of questions before we get into the tax area.

Was there ever an occasion that you sat in a darkened courtroom with Stanley Brown?

A No.

Q Did you ever tell Stanley Brown that your chambers and Judge Foley's chambers were bugged?

A No.

Q Did you ever speak to Judge Reed about Joe Conforte?

A No. Or any other judge.

Q Judge Claiborne, you indicated that you believe that Mr. Conforte got your professional card when you were discussing the motion for new trial. When did that discussion take place, was that after you became a judge?

A Before.

Q This was when you were talking to him about whether or not you would represent him in that motion; is that correct?

A I'm not sure. I -- there was a meeting where Mr. Brown and Mr. Conforte came to Las Vegas. I hate to go back, but may I go back?

Q Please.

A Mr. Conforte was sentenced in October of 1977. Then there was a general discussion about the appeal immediately afterwards.

My recollection is we went prepared to file a notice of appeal on the sentence anyway, whatever sentence he would have obtained.

My recollection is we filed the notice of appeal the day he was sentenced. Then there was a discussion about the appeal and the work on the appeal and who would be responsible for the briefs. I had been brought into the case a few days before the sentencing by Sally Conforte. And we were to be co-counsel on that appeal.

Then there was, after that there was much discussion somewhere down around November, December, January, in that period of time, about the information about Judge Thompson's alleged statement at a coctail party and the decisions whether or not to file a motion for new trial based upon the ground, which decision was finally made that they would do that.

In that period of time, I got out. Immediately before I got out or after I got out, and I am not clear on this, Mr. Brown and Mr. Conforte visited my office and I, my recollection is that they were urging me to come back to the case. And I believe that was the time that I gave him the card because about that time I had changed my number, and I believe that one or the other of them said we called you and we couldn't get you, you have changed your number. And I wrote out my new number on the card and gave it to him.

Q That was the number that's on the front of the card?

A I'm pretty sure that that's when it was. I know that I gave him the card while, before -- long before I got on the bench.

Q The next time you saw that card was when you were in Portland; is that correct?

A That's right.

Q And did you ever ask Stanley Brown for Joe Conforte's telephone number?

A Never in my life.

Q I would like to call your attention to your method of keeping records of fees before going on the bench. How did you keep track of fees received from your law practice before you took the bench on September the 1st of 1978?

A We had a simple effective system. If a client came in and I collected the fee from the client or Mr. Brown collected the fee from a client or Miss Quintana, we had a printed form. We would take the money, clip it to the form with the name of the client or we'd send the client out to Miss McElwain and she would take the money. That money was kept by her.

She made deposits. I wouldn't know, but I would say probably daily or periodically, and she would give the client a receipt before the client left.

The receipt book was made up of three copies. The original went to the client, a copy was put in the client's file and a copy remained in the receipts book.

She would, as I said, make the deposits. The bank statements went direct to Mr. Wright's office.

Q Is that to Mr. Joseph Wright?

A That's correct.

Q Who has also been referred to as Jay Wright during this trial?

A That's correct.

Q Did you give any instructions to Mr. Wright as to how he should treat your, the amount of fees you received during the year?

A Yes. He was to treat all deposits as ordinary income, save and except those items that he had specific instructions to do otherwise with.

Q Were there instances when deposits that were not income were reported as income?

A Oh, sure.

Q Now, who prepared your returns before you went on the bench?

A Joseph C. Wright.

Q And how long had Mr. Wright been preparing your returns?

A He said thirty years. I believe longer than that.

Q All right. Did you and he ever go over your returns with each other after they were prepared and before they were filed?

A I would say in the last 15 years that he did my returns, that we never, absolutely never went over the returns together.

Q And why is that, sir?

A Well, I had absolute 100 percent faith and confidence in his ability, and integrity and I knew it was correct, let's put it that way.

Q Were there ever occasions when you signed tax returns in blank and provided those returns to Mr. Wright?

A Many times.

Q And what would occasion that? Why would you sign a blank return and give it to him?

A Well, I have never checked on my returns, but I would just venture a guess. I don't think we ever met the deadline and filed our returns on time. I think we always sought and got an extension.

If I were to be out, say if I were to go to Alberquerque to try a lawsuit and it came close to the deadline for filing, I would go by his office and sign the return that the Government sends you in blank and most times, I'd sign a duplicate in blank in case that he made an error or something and had to do the return over.

Q Did you see these returns that you had signed in blank before they were filed?

A Did I what?

Q Did you see the returns which you had signed in blank before they were filed?

A No. Of course not.

Q And did you ever --

A I would generally be gone.

Q Did you ever suggest to Mr. Wright that he should cut any corners as far as your taxes were concerned?

A You heard what he said. He said I never did.

Q What instructions did you give Mr. Wright?

A I constantly told Mr. Wright and not every year, but every time that any instance would come up where there was some questions about how to treat it, I'd say treat it in favor of the Government, because I went through a couple of audits and after that experience, I never wanted another one and I said, "Treat it in favor of the Government." I figured that's the way to save myself a lot of expense and a lot of time. Because when you audit a law firm and you are the sole practitioner, as I was, with a heavy practice that I had, then during that audit, you just stop. You can't take anything else, because you are daily answering questions, you are digging up records and it costs you a good two months time. I felt I couldn't afford two months time, and that was my way of saving money and saving time.

Q Judge Claiborne, after you took the bench, in September of 1978, did your method of keeping records change?

A Yes, it did.

Q And in what way did it change?

A Well, I no longer had a business and I no longer was in the practice of law, and I was like every, any other citizen. I didn't need an accountant and didn't have one. I am beginning to believe now that was the biggest mistake of my life. I should have kept one, but nevertheless I felt I didn't need it, and I most assuredly did not.

Q And did you continue to deposit the moneys received as fees in the bank?

A Yes.

Q All right. Were there times that you did not deposit those moneys, but cashed the moneys?

A Many times.

Q And where would you cash various checks which represented income derived as a result of your practice after you became a judge?

A (No response.)

Q Where did you cash these checks?

A I would cash most of them at the Horseshoe.

Q Can you recall other places where you cashed the checks?

A At the Nugget.

Q All right. And here in Reno, did you ever have the occasion to cash checks?

A I really don't recall that. I heard it in this trial, but I surely don't recall it. I no doubt did, you know.

Q Why did you cash checks rather than deposit the checks in the bank?

A For convenience.

Q And did you do that in order to conceal income?

A Of course not.

Q Did you --

A You don't declare the amount of each check you get. You declare the amount that you receive.

Q Well, did you keep any type of a record concerning the checks which you received which you cashed?

A Repeat that.

Q Did you keep any kind of a record --

A Yes, I did.

Q Will you tell the jury about what kind of record you kept which would reflect the fact that you received checks and cashed the checks?

A A very simple system in my mind, at the time.

If I say, for instance, Jim Brown sent me a check that he had collected for me, I would take the check and I would record the amount of the check on a little square notepaper in a rack that I had. I would just take a piece of paper, I would write out the amount, the date, and drop it in an envelope in my desk drawer. Periodically I would take that envelope home and I would transfer those slips to an envelope that I had in my desk. I had an office in my home and that's where I kept it. Periodically I would record, take those slips and I would record them in a book that I had for my own use, not a bookkeeping book, but just my own use so that I would know where certain items went, and I could keep some kind of account of my financial status as far as those accounts were concerned.

So I started recording them in this book. I wouldn't do it daily, wouldn't do it as I received them, but they would accumulate and I would do them periodically.

Q Now, was this book --

MR. GOODMAN: Let me have this marked, please.

(Whereupon a book was marked as Defendant's Exhibit No. 47 for identification.)

BY MR. GOODMAN:

Q I show you what's been marked for identification as Defendant's proposed Exhibit No. 47 and ask you, Judge Claiborne, whether this is the book to which you have made reference?

A That's the book.

Q If you would keep that.

I am going to show you, Judge Claiborne, what has been introduced into evidence as Government's Exhibit 10 and Government's Exhibit 34 and ask whether you recognize these documents?

A Yes.

Q All right. Now, in Exhibit 10, with the Court's permission, if I could stand here to ask the question.

THE COURT: Yes. That will be all right.

MR. GOODMAN: Thank you.

BY MR. GOODMAN:

Q These reflect checks from James J. Brown dated September 29th, 1978, in the amount of $1207.10, which appears to be deposited, a check in the amount of $2250, dated September 29, 1978, which appears to be deposited. A check in the amount of $2,000 dated October 16, 1978, which appears to be deposited, a check dated November 4, 1978, in the amount of $2209.27, which appears to be deposited, and a check dated December 16th, 1978, in the amount of

$1968.75 which appears to be deposited, all the deposits taking place in the Pioneer Bank.

Does your book reflect a recordation of those moneys received by you?

A Yes. Each one of those.

Q At this time I would direct your attention to Government's Exhibit No. 34, which contains therein a check made payable to you in the amount of $10,260.50, dated December 1st, 1978, from Southern Wine and Spirits of Nevada, Inc., which appears to be deposited in the Pioneer Citizens Bank. Is that check reflected in your book?

A It's dated December 1st?

Q The check appears to bear the date December 1st, 1978.

A I have it recorded in my book, but I have it recorded as December 20.

Q All right. Would that mean to you -- well the check is dated December the 1st, but your book does reflect the fact that you received that amount of money, $10,260.50 from Southern Wine and Spirts; is that correct?

A Yes. And I see it was not deposited until December 20th.

Q All right. Did you also receive, through Stan Brown, a payment as a fee for work that you had done in representing Sally Conforte in her tax case?

A Yes.

Q And that fee was, in what amount, sir?

A $5,000.

Q And was that by check or by cash?

A By cash.

Q Did you ask for it to be in cash?

A No.

Q Did you --

A I was happy to get it anyway I could get it.

Q Did you reflect, in the record which you have kept, the fact that you received the $5,000 from Stan Brown?

A Yes.

Q And can you recall the date or can you tell us what date you recall the money being received by you from Stan Brown?

A October 23rd, 1978.

Q Now, I'd like to call your attention, Judge Claiborne, to the sale of a library to Archie McLaren or McLaren. Did you sell a part of your library to Mr. McLaren before he, before you went on the bench?

A Yes, I did.

Q And I'd like to show you Government's Exhibit No. 36 and ask whether or not the checks contained therein reflect the amount of money which you received from Mr. McLaren or McLaren as payment for your law library?

A Yes, it does.

Q Now, once again, I am going to ask you to refer to your legal fee book and ask you to tell the jury whether or not that transaction is reflected in that book?

A Yes, the $5500 payment as of October 11, 1978, and $500 as a part of deposit made December 20, 1978.

MR. GOODMAN: I would like to have this marked, please, as Defendant's next in order.

(Whereupon a letter from Joseph C. Wright dated June 15, 1979, to Harry E. Claiborne was marked as Defendant's Exhibit 48 for identification.)

BY MR. GOODMAN:

Q I am going to show you what's been marked as Defendant's proposed Exhibit No. 48 and ask whether you are able to identify the same?

A That's a letter I received from Jay Wright or Joseph C. Wright dated June the 15th, 1979, advising me that he had filed an application for extension, and for me to look for it and to see whether or not it was allowed or denied, and to notify him accordingly and my acknowledgement written in longhand on the bottom as was customary and a letter from me.

Q All right. And the letter which you wrote on the bottom to Mr. Jay Wright, did that include the amount of moneys which you reflected in your yellow pad where you were keeping a documentary of the moneys received from your private practice?

A Yes.

Q And would you tell the jury what you advised Mr. Wright in response to his typed letter of June the 15th of 1979, which you responded to in handwriting?

MR. HENDRICKS: Objection, that's hearsay. Apparently he's going to read from a document which is not in evidence, your Honor.

MR. GOODMAN: Your Honor, at this time I would move its admission in evidence.

MR. HENDRICKS: This is one of the documents that they provided to us in violation of Rule 16.

MR. GOODMAN: Your Honor, if it please the Court, this was provided to them before trial.

THE COURT: Members of the jury, step out, if you will, please.

(Whereupon the following proceedings were held outside the presence of the jury.)

THE COURT: Exactly what was provided in response to Rule 16?

MR. GOODMAN: Your Honor, the Friday before the trial commenced, this document was turned over to the Government.

THE COURT: You were aware of my order, were you not?

MR. GOODMAN: Yes, I was.

THE COURT: And you, in a conference telephone call when I was in Philadelphia, you told me that everything had been produced to the Government with the exception of a bankruptcy schedule, I believe, that you were talking about, and one other item which was not this letter; isn't that correct?

MR. GOODMAN: Basically, that is correct, your Honor. However, I would advise the Court that at that point in time, I did not have the expertise of Mr. Johnston to rely upon and Mr. Johnston, prior to the trial when he was brought into the case at the eleventh hour, so to speak, went over the various documents which he believed were necessary and pertinent to the presentation of our case, and as soon as he did that, I made them available to the Federal Government and they had plenty of notice.

THE COURT: You did not ever report to me that you needed more time. In fact, when I sent the order out from Philadelphia, there was no request for any additional items to be presented that you had overlooked or anything like that.

MR. GOODMAN: When I was preparing the case for my limited knowledge of tax, I felt that we had all the documents which we need when Mr. Johnston came in and brought his expertise to the case, he looked through all of the records and he made suggestions as to what would be pertinent and as soon as he did that, we made them available to the Government.

THE COURT: Mr. Goodman, it's not the Government's fault and it's not my fault that Mr. Johnston was brought in at a late date.

MR. GOODMAN: Well, in essence, it wasn't my fault either. As the Court can well reflect, Mr. Drendel, who had certain obligations and responsibilities in the case --

THE COURT: Is Mr. Drendel an expert?

MR. GOODMAN: No, he isn't.

THE COURT: Well, then, what difference does it make if Mr. Drendel doesn't have the qualifications of Mr. Johnston, that's meaningless as far as I am concerned.

MR. GOODMAN: We divided up the responsibility as far as the case was concerned.

THE COURT: I sustain the objection.

MR. GOODMAN: Fine.

THE COURT: As to this Exhibit No. 48.

MR. HENDRICKS: Your Honor, the book, 47, was also provided to us on the same date, the 9th of March. Both Defendant's proposed 47 and 48 were provided after your Honor's ruling.

THE COURT: Of course, I heard no objection as to any book.

MR. HENDRICKS: It has not been moved into evidence.

THE COURT: I know that, but he's been reading -- Judge Claiborne has been reading from the book. What am I going to do now?

MR. HENDRICKS: Well, your Honor, I took that to be simply questions which were predicate to a motion to introduce the book at which time I would have objected.

THE COURT: Well, you let Judge Claiborne testify about, that he would keep a record of the checks, that he received in cash, that he would record the amount of the checks received and the source and drop a slip in an envelope; that he then took these envelopes periodically home and recorded them in a book, and he didn't claim to record them daily or anything like that.

Now, the difficulty is I don't know what the defendant has given the Government in response to the order. I have no way of knowing. You don't keep me advised. I don't even know what the Government has given the defense.

But my order was very plain. Had you said anything to me and kept the Court advised, either side, I could have done something.

But I will have to -- we have gone so far with the book now --

MR. HENDRICKS: Your Honor, may I with respect to the book, I took these preliminary questions as two things: First, there was a refreshing of recollection when he was testifying as to the individual checks, which are in evidence. Second, I took the identifications with respect to the book simply as predicate questions which would have led to the motion to introduce the book at which time I clearly would have objected and I objected to the first time.

THE COURT: The exhibit cannot be read into evidence. That is perhaps let into evidence, Defendant's Exhibit 47, that has not been offered, but there has been a lot of conversation about it, and if I now should exclude the book and tell this jury to disregard everything that was said about the book, we've gone too far in that.

I had assumed that the book had been timely given to the Government in accordance with my order.

Let me see Exhibit 48, if you will, Judge.

I will sustain the objection to Exhibit 48 for the reasons previously stated.

MR. HENDRICKS: Your Honor, we are not asking the Court to advise the jury to disregard any questions which have been asked to this point.

THE COURT: Well, No. 47, Defendant's Exhibit 47 hasn't even been offered, has it?

MR. GOODMAN: No, your Honor.

MR. HENDRICKS: Well, I would then object to any further questions on the grounds, I certainly did not proceed with the notion that the Government was waiving a right to object to the introduction of a document because certain questions, preliminary questions were put to the witness relative to what it constitutes. I would object to any further questions relevant to the book, and I will object to the admissibility of the book because it was not, it was given to us in violation of the Court's order, after the Court had ruled from Philadelphia in this matter.

THE COURT: No question about that. You gentlemen called me on a conference telephone call while I was in Philadelphia, sitting with the United States Court of Appeals for the Third Circuit. At that time, as I recall, Mr. Shaw was protesting that the defense had not complied with the prior verbal orders that I had issued with respect to Rule 16(b), and at that time, as I recall it, and I stand corrected, I am willing to stand corrected, if there is any controversy about it, that Mr. Goodman told me that there was a bankruptcy schedule that hadn't been turned over and that it was available on his desk and then there was one other item, but it was not either of these two items.

MR. GOODMAN: I think it was the yellow piece of paper which I indicated that I had offered to make available to them, but we had that disagreement as to when it was going to be copied whether I should go home and get the facilities.

THE COURT: In any event, it is not related to these two items.

MR. GOODMAN: No, it wasn't.

THE COURT: Now, at that time, Mr. Goodman stated that those items were on his desk, and Mr. Shaw wanted them delivered in Reno and I said you just send one of your FBI agents to Mr. Goodman's office at Las Vegas and pick them up, if you want them.

I assume --

MR. HENDRICKS: We did that, your Honor, and we are in possession of a receipt which explicitly mentions each and every one of the documents we received on that day. We did not receive either of these proposed exhibits.

THE COURT: Is that correct?

MR. GOODMAN: That's correct, but he didn't finish the sentence: until about three days later. That's the end of the sentence.

THE COURT: I understand that, but that is rather typical of what we have had to put up with in this trial. Apparently you don't think that Rule 16(b) means anything and, Mr. Goodman, and I have been pretty patient throughout, actually that material should have been submitted long prior to the cutoff date that I put right in the order, and I stated in the conference telephone call that since Mr. Goodman said he had now produced all of the available material, except the two items in question, bankruptcy schedule and one other I think, that that would be the cutoff date.

Now, I'm faced with this. I sustain the objection.

MR. GOODMAN: I am ready to proceed, your Honor.

THE COURT: Call the jury.

(The following proceedings were held in open court before the jury.)

THE COURT: All right, sir.

MR. GOODMAN: Thank you.

BY MR. GOODMAN:

Q Judge Claiborne, in response to an inquiry from Mr. Wright, did you inform him as to the moneys you received from your private practice?

A I did.

Q And did you advise him of a specific figure which you received from your private practice which included the money received from Mr. McLaren?

A I did.

Q And what was that figure, sir?

A (No response.)

Q Can you recall?

A What year are we talking about?

Q This would be for your 1978 return, which was filed in 1979.

A $35,575.

Q And you told that to Mr. Wright; is that correct?

A That is correct.

Q And now, I would like to call your attention to your 1978 return, which is Exhibit G-3. I want to show you that. I ask you whether or not your signature appears in Exhibit G-3?

A It does.

Q And is there a date which is opposite your signature?

A Yes. Dated October 15, 1979, and Mr. Wright signed it October 15, '79.

Q Is that the date on which you signed it?

A No.

Q Where were you on October the 15th of 1979?

A I was trying the Bonneville Power cases in Richland, Washington.

Q And was this one of the returns which you signed in blank before you left for a case or your legal duties?

A It was.

Q At that point in time you were out of Las Vegas?

A I was in the state of Washington, Eastern Federal District of Washington.

Q I would like to show you what's been introduced in evidence as Government's Exhibit No. 41. If you would look at that, sir, I have a question.

What is that document?

A It's a letter from me to Joseph C. Wright, enclosing three signed 1040's for the year 1978.

Q Now, were these 1040's already signed in blank?

A They were blank.

Q All right. Did you ever see the completed 1978 return before it was filed?

A No.

Q Did Mr. Wright ever review the figures which were on the 1978 return with you?

A No. He mailed me a copy.

Q All right. Now, if you would -- do you have Exhibit No. 41 in front of you, Judge?

A Yes, I do.

Q Is that the copy that you have?

A Yes.

Q All right. I would like to ask you to read that document to the jury with the Court's permission.

A The document says, "Jay, I had to go to the Eastern District of Washington. Find enclosed three 1978 1040's signed. Please prepare and then mail for me. I made an exhaustive check of everything you have, except one item I discovered in 1978 I took interest in land for a fee, then sold the land in 1978. I got $30,000 so include that as income."

Q All right. Now, did you intend that Mr. Wright include the $30,000 which you make reference to as income on your tax return?

A Yes.

Q And is it your understanding that that figure was reported as ordinary income for the year 1978?

A It was. That's the Peccole transaction.

Q Now, you say it's the Peccole transaction. From whom did you receive the $30,000?

A William Peccole.

Q Would you be kind enough to tell the ladies and gentlemen of the jury how that $30,000 transaction took place, and from its inception until the time that you received the $30,000.

A 1967 Bill Peccole walked into my office and he handed me an assignment of a one percent interest in a piece of property. And before he handed it to me, he said, "Do you have $10," and I said sure. And he said, "Give me $10." So I had to give him $10 and he handed me an assignment for one percent interest in this piece of property. And so I looked at it and I read it and then I laughed and I said, "Where is this? On top of Mount Charleston?"

Q Where was Mount Charleston?

A That's a mountain near Las Vegas.

Q It's not too near, is it?

A Thirty-five, forty miles.

Q Okay.

A He said no. He said, "Someday," he said, "the population is going to spread westward in this town," and he said, "Someday in our lifetime this property will be valuable." He said, "Right now it's all desert and it's out in," what we considered then as, "out in the boondocks." And he was right. It became extremely valuable property.

Q What was your relationship with Mr. Peccole at the time that he assigned this property to you for $10 consideration?

A I met Mr. Peccole during World War II. We met at Santa Ana Army Base in Santa Ana, California. And we became extremely close friends and then we were separated and eventually wound up in Las Vegas Army Base again. Together.

We were both young men when we got out of the service and I made my home in Las Vegas, that was his home already. And in this period of time, I had met his father and his family and socialized in their home on many occasions and I began to practice law and he went into the real estate business. And he got into politics and he ran for the City Commission and I supported him and helped him and we were very close friends. Our families had dinner together and visited each other's homes and we were just very good friends.

Q Did you ever do any legal work for Mr. Peccole.

A Never.

Q I am going to show you, Judge Claiborne, what has been introduced in evidence as Government's Exhibit 37. If you would look at it.

I ask you, sir, whether that reflects the assignment of real property interest in 1977?

A Yes.

Q And is there also an agreement in that exhibit dated November the 29th, 1977?

A Yes.

Q Did you sign the agreement on that date?

A Yes, I did.

Q Is there also in that exhibit, Judge Claiborne, a check dated December the 30th of 1977, in the amount of

$30,000?

A Yes, there is.

Q And who is it payable to?

A To Harry Claiborne.

Q And from whom is it payable?

A William Peccole.

Q Is there also a deposit slip in Exhibit No. 37, which reflects the deposit of that check?

A A deposit slip?

Q Yes, sir.

A I don't see one.

Q All right. Did you receive the check?

A Yes, I did.

Q And when did you receive it?

A I received it on the 30th.

Q The 30th of what?

A Of December, 1977.

Q All right. How did you receive it?

A Mr. Peccole handed it to me in person, walked in the office and handed it to me.

Q Did you record that check?

A Record it?

Q Yes.

A Yes, I did.

Q You made note of the fact that you received that check?

A Yes, I did.

Q Why did you tell Jay Wright that the $30,000 resulted from a sale in 1978 after an interest in land which was taken as a fee, why did you tell him that?

A I'll tell you why I told him that. I mean I got the check from him in December. Some time later on when it became tax time or time to prepare the return, I tried to locate Mr. Peccole to find out how he had treated the transaction on his books. I wasn't sure from the manner in which he did it, he walked in and said give me $10, whether or not he had treated it as a gift or treated it some other way, and I wanted to find out. I wasn't able to find out, so I wrote Jay a note and I said, "Treat it as a fee and as ordinary income."

I didn't say ordinary income because I knew it would be treated as a fee, that's the way he would treat it and that's what he did.

Q You know that had you described it accurately, that it would have been treated as a capital gain?

A Oh, yes. Yes, I know that.

Q And it would have been a substantial tax difference?

A That's correct.

Q Do you recall when you deposited that particular $30,000 check?

A On January the 3rd.

Q Of what year?

A 1978.

Q All right. Did you have any other transaction in 1977 or 1978 involving the sale of an interest in land for $30,000?

A No. That was the only one.

Q So that's the only transaction for $30,000 in 1977 or 1978?

A Yes. Mr. Wysocky is in error. There was one $30,000 transaction.

Q Now, Mr. Wysocky was the gentleman who was the Government's summary witness on the taxes; is that right?

A That's correct. He treats it as two separate transactions. It was one transaction.

Q There's only one $30,000 amount received during those two years?

A That is correct.

Q Now, I'd like to talk to you about the 1979 tax returns and I am going to show you, with the Court's permission, I am going to approach you, Judge Claiborne, and ask you to look at two folders evidencing matters which are already in evidence and in particular, I would like to ask you some questions about Government's Exhibit 11, which you have in front of you.

This exhibit contains nine checks from James J. Brown to yourself, does it not?

A Yes.

Q All right. I'd like to specify the date and the amount of the check, the first check appears to be a check dated January the 5th of 1979, in the amount of some $3381.10, which was deposited at the Pioneer Citizens Bank; is that correct?

A That's correct.

Q The next check is a check dated January 19, 1979, in the amount of $17,500, which appears to be deposited at the Pioneer Citizens Bank; is that correct?

A That's correct.

Q The next check is a check dated January the 26th of 1979 in the amounf of $833.33, which appears to have been cashed at the Horseshoe Club; is that correct?

A That's correct.

Q And the next is a check in the amount of $84.38 dated January the 26th of 1979, which appears to be deposited at the Pioneer Citizens Bank, correct?

A That's correct.

Q The next in order would be a check dated February 15, 1979, in the amount of $1106.66, which appears to have been negotiated at the Horseshoe Club in Las Vegas; is that right?

A That's correct.

Q The next check is a check in the amount of $7,000 dated July 19, 1979, which appears to have been deposited at the Pioneer Citizens Bank; is that correct?

A That's correct.

Q The next check is August 31st, 1979, in the amount of $2905.90, which appears to have been negotiated at the Horseshoe; is that correct?

A That's correct.

Q The next to last check is a check dated November 13, 1979, in the amount of $3,011.56, which appears to have been negotiated at the Horseshoe Club; is that correct?

A That's correct.

Q And the last check in Defendant's Exhibit No. 11 is a check dated November 13, 1979, in the amount of $250, which appears to have been deposited at the Pioneer Citizens Bank; is that correct?

A That's correct.

Q Now, I'd like you to refer to Exhibit 16 now and ask whether that document which is in evidence contains five cashier's checks which you received?

A Yes, it does.

Q And from whom did you receive these five cashier's checks?

A Annette Quintana.

Q And each check is in what amount?

A $1,000.

Q Are you able to tell the jury the date -- well, is the first date January the 16th of 1979, this cashier's check?

A Cashed at the Holiday Hotel.

Q Where?

A In Reno, Nevada.

Q All right. The next check is dated what date?

A February the 12th of 1979.

Q How was that negotiated?

A I can't tell.

Q All right. But you received the check, did you not?

A Yes, I did.

Q All right. And the next check is a check dated -- is that March the 9th of 1979 in the amount of $1,000?

A Yes, it is.

Q Can you tell us how that was negotiated?

A No, I cannot.

Q But you did receive it, did you not?

A Yes, I did.

Q And the next check is a check dated March -- nope. April 12th, 1979, in the amount of $1,000. Are you able to tell us how that was negotiated?

A Yes. That was deposited at the Pioneer Bank.

Q And the last check in this series --

THE COURT: Deposited in what bank?

THE WITNESS: Pioneer Citizens.

THE COURT: All right.

BY MR. GOODMAN:

Q And the last check dated May 14th, 1979, in the amount of $1,000 was negotiated where, if you could tell?

A Horseshoe.

Q And you received all of that money, did you not?

A Yes, I did.

Q Now, I'd like to show you what's been introduced in evidence as Defendant's Exhibit 1 and ask you if you are familiar with this document, Judge Claiborne?

A Yes, I am.

Q What is that document?

A That's a letter written by me on April the 11th, 1980, in longhand to J. Wright advising, enclosing my W-2 form, a check for $8,000 that he requested for the extension, and a statement of my fees, during 1979 for $41,734.93.

Q All right. Now, did you -- when you received the checks which are reflected in Exhibits No. 11 and 16, did you make a notation that you in fact received that money?

A Yes, I did.

Q And how did you make that notation, using the same system?

A Same records that I told you about a few minutes ago that I had put the slip in an envelope and periodically recorded it in the book.

Q And when you wrote your letter to Mr. Wright, on or about April the 11th of 1980, did you make reference to your record when you told him that you had received the $41,073.93 from fees from your private practice?

A Yes. I had not yet recorded them in the book and I took the slip and I added them up and it came to this amount and I stated it.

Q Why did you write the letter to Mr. Wright?

A Why?

Q Yes. What caused you to write the letter of April the 11th of 1980?

A Because he called me and he asked me to furnish him a check for $8,000 and my W-2 form, and a statement of my income.

Q All right. Did you in fact cause a check in the amount of $8,000 to be written?

A Yes, I did.

Q And did you cause the gathering of your W-2 form to be transmitted to him?

A Yes, I did.

Q And did you write this letter advising him of your income to accompany the W-2 as well as the check in the amount of $8,000?

A I did.

Q Did you deliver that letter?

A No.

Q Do you know whether that letter was delivered to Mr. Wright?

A My secretary, Judy Ahlstrom, delivered them.

Q How did that come about?

A It came about because I was on my way to San Francisco and that day, and I was to sit in the Ninth Circuit on Monday and Tuesday of the next week, and I was trying to clean up and get everything done that was, that I had to do before I left. And I asked her if, as a favor to me, if she would deliver it to Mr. Wright's office because he said he wanted it that day. It was a Friday. And she did.

Q What day was the check dated?

A What day the check was dated?

Q Yes.

A I would assume it was dated April 11th.

Q And to whom was it made payable?

A Internal Revenue Service.

Q I am going to show you Exhibit 49, Government's Exhibit 49 which is in evidence.

What's that document, sir?

A It's an application for automatic extension of time, filed in the United States Individual Tax Return.

Q For what year?

A 1979.

Q Whose signature appears at the bottom of the application?

A Joseph Wright.

Q Is there a handwritten date next to Mr. Wright's signature?

A Yes. 4/11/80.

Q Does that application, that would be April the 11th, 1980?

A Yes

Q Does that application indicate the amount of tax due with the application?

A $8,000.

Q And was that the amount that you wrote your check for on April the 11th of 1980?

A That is correct.

Q Did there come a time during that day of April the 11th of 1980, that you heard again from Mr. Wright,

A Yes. He called within a matter of an hour, hour and a half.

Q And did he make a request of you?

A Yes.

Q What did he want you to do?

MR. HENDRICKS: Objection. Hearsay.

THE WITNESS: He said --

MR. GOODMAN: Mr. Wright testified to this, to the best of my recollection.

THE COURT: I don't recall what Mr. Wright testified to, gentlemen. How in the world anyone can keep track of this. We have a partial testimony of Joseph C. Wright that has been transcribed. Is it in there?

MR. GOODMAN: I can't, with all candor, I can't tell the Court that it's in there.

THE COURT: Members of the jury, take the usual walk again.

(Whereupon the jury was excused. The following proceedings were held in open court out of the presence of the jury.)

THE COURT: Who caused the partial transcript to be prepared?

MR. GOODMAN: I believe that was prepared at the insistence of Mr. Johnston.

THE COURT: Is it in there, gentlemen?

MR. JOHNSTON: I'm not sure, your Honor, offhand.

THE COURT: What specifically do you desire?

MR. GOODMAN: It's not crucial because I could just ask the question based on what Mr. Wright said to you, what did you do and I am going to get the same result.

THE COURT: Well, that clearly would be fine.

MR. GOODMAN: I submit it's not hearsay, but if the Court thinks it is --

THE COURT: Well, of course, Judge Claiborne has a perfect right to contradict anything that Mr. Wright may have said.

MR. GOODMAN: It's not being offered for that purpose. It's being offered to show that Judge Claiborne responded to a request of Mr. Wright.

THE COURT: All right.

MR. GOODMAN: So I could ask the question that way.

THE COURT: Yes, you may ask him what he did in response to whatever Mr. Wright advised him.

Well, the jury's gone out. Let's get the jury back in here if we can, Mr. Marshal.

(The following proceedings were held in open court before the jury.)

THE COURT: All right, Mr. Goodman.

BY MR. GOODMAN:

Q Later in the day of April the 11th of 1980, did you hear from Mr. Wright?

A Yes, I did.

Q As a result of your hearing from Mr. Wright, did you do anything?

A Yes, I did.

Q What did you do, Judge Claiborne?

A I wrote out another check for $2500.

Q What was that for?

A For estimated tax.

Q And to whom was that made payable?

A Internal Revenue Service.

Q I ask you to look at Government's Exhibit 49 and ask you whether or not a copy of that check is in that exhibit?

A It is.

Q And what date does it bear?

A April 11th, 1980.

Q And after you wrote the check, what did you do?

A I wrote a check for $2500 and I went by his office and I gave it to him and he said, "Here, sign this." And he handed me an estimated tax form 1040ES and I signed it.

Q All right. Do you have that in front of you?

A Yes, I do.

Q Would you please read the first printed line immediately under your name and address?

A Immediately under?

MR. GOODMAN: Right. Is this the application that we are making reference to? I'm sorry. I am referring to the wrong document.

THE WITNESS: Immediately under it would have been spouse's signature is what's presented.

MR. GOODMAN: That's the difficulty from where I'm standing.

BY MR. GOODMAN:

Q Do you know whether or not an automatic, an application for an automatic extension was filed?

A Yes.

Q And do you know what date that was signed?

A April 11th, 1980.

Q Now, did you ever see the 1979 return before it was filed?

A I don't think so.

Q All right. Did you sign the return in blank?

A Yes.

Q All right. Do you know when you actually did sign the return?

A I think on May 5th or 6th, somewhere in that neighborhood.

Q Did you review with Mr. Wright the content of the return before it was filed?

A No.

Q Did you have any idea whether or not your legal fees were reported? ✓

A (No response.)

Q On that return?

A No.

Q All right. Why didn't you check with Mr. Wright before it was sent?

A That's a difficult question because I, my recollection of those events, I received a call and asked if I would go -- from Judge Browning's office, asking me if I would go to Los Angeles to try a criminal matter.

Q Judge Browning is whom?

A The Chief Judge of the Ninth Circuit Court of Appeals. He is my boss.

Q And?

A And I made inquiry and I was expecting to try a case that would last some time. I, once again, signed some blank returns.

I went to Los Angeles and the protracted case did not go that day. For some reason it went off calendar.

THE COURT: What days are we talking about now, Judge?

THE WITNESS: We are talking about, I think, May 8th, Judge.

It went off calendar and I was assigned another case. I was there, so I was assigned another case. I tried that and it took all week. I came home at the end of the week.

Q Now, I'd like to show you what's been marked as Government's Exhibit 50 and introduced in evidence. And ask whether or not you are able to identify this document?

A Yes.

Q What is it?

A It's one sheet, no, no. I see it's all here. It's information requested by Mr. Wright.

Q Is it in your handwriting?

A Yes, some of it.

Q All right. And on that sheet, does it reflect private law practice before Judgeship and an amount?

A Yes.

Q What is that amount on that sheet?

A $22,332.87.

Q How do you account for that figure appearing on the sheet?

A How do I account for it?

Q Yes.

A That's Mr. Wright's figure.

Q How did it get on the sheet?

A He told me.

Q How did that come about?

A Well, he called me and he said, "Here's what I want," and he started out, he said earnings and I said one, and he said interest earnings and I put that two.

Q Are those words reflected on that exhibit?

A Yes.

Q All right. And you would write down the words pursuant to what Mr. Wright had told you; is that correct?

A Yeah, what he wanted, so I put them in numbers what he wanted, so then I took the legal tablet and I started out earnings. While I was talking to him, he said, "Well, wait a minute."

MR. HENDRICKS: Could we have a date for this conversation, please?

BY MR. GOODMAN:

Q When did this take place, if you can recall, Judge Claiborne?

A In May.

Q Of what year?

A Of 1980.

Q Okay. In your conversation with Mr. Wright, Mr. Wright was advising you as to various information that he needed; is that correct?

A That's correct.

Q And you were writing that down on the document which is in front of you as Exhibit No. 50; is that correct?

A All right. Would you continue to tell the jury as to what you were doing when you were speaking with Mr. Wright on the phone?

A I went back to the first paragraph and I said, earnings. You have my W-2. And he said, "Yeah, I've got it here."

And I said, "Well, what is that?"

And he said, "$54,499.92."

I said, "You also have my, the amount from private law practice that I collected."

And he said, "Yes, I do."

And I said, "Well, that's that."

And he said, "$22,332.87."

I wrote it down. He admitted on the witness stand that --

MR. HENDRICKS: Excuse me, I will object to that.

THE WITNESS: Well, excuse me.

THE COURT: Yes.

BY MR. GOODMAN:

Q Basically, were you discussing this with Mr. Wright, you were receiving information from him and you were placing it on what is now Government's Exhibit No. 50; is that correct?

A That is correct.

Q Did you have anything at all to do with the computation of that figure of $22,332.87?

A No.

Q I would like to show you now, Judge Claiborne, what's been introduced as Government Exhibit No. 48 and ask you to look at this, sir.

What is that document?

A These letters were written by Joseph Wright to lending institutions.

Q What are the dates of the letters and to whom are they addressed?

A March 7, 1980, to Stanwell Mortgage Company in Las Vegas, Nevada, and May 22nd, 1980, to First National Bank of Las Vegas and the third one is May the 22nd 1980, to First Western Savings and Loan Association.

Q And these letters were written by whom?

A Written by Joseph C. Wright.

Q And would you please read the third paragraph of those -- by the way, are all three of those letters identical, but for the name of the party to whom they are addressed and the date that the letter is written?

A They are.

Q Would you plase read to the jury the third paragraph.

A His earnings for private law practice for the year 1979 was $45,371.93.

Q And is that the same figure, the $45,371.93 figure, the same figure that you gave to Mr. Wright in your letter to him of April the 11th of 1980, which is before you as Defendant's Exhibit No. 1?

A I don't know. $45,371.93.

Q Yes.

A No, it is not the same figure. I gave him April the 11th, 1980.

Q What figure did you give to Mr. Wright on April the 11th of 1980?

A $41,073.93.

Q Do you know how Mr. Wright arrived at the figure of $45,371.93 (sic)?

A No. Not really.

Q All right. But that was the figure that he advised the various mortgage companies about when he wrote the letters; is that correct?

A That is correct.

Q All right. Now, directing -- let's see. Do you have Exhibit 47 in front of you?

A No.

Q I'd like to show you what's been introduced as Exhibit No. 47 and ask you to look at the same.

What's that, Judge Claiborne?

A It's a letter written by me to Mr. Wright stating, asking him to write letters to these lending institutions, I presume.

Q Was that the limited purpose of your letter to him?

A That's correct.

Q Do you know when your letter to him was written?

A No. It's undated.

Q All right. Were these figures which you provided to Mr. Wright intended for purposes of writing to the mortgage companies or for purposes of taxes?

A It was for the mortgage companies.

Q Do you have Exhibit 48 in front of you?

A Do I?

Q I believe you do.

A Yes, I do.

Q Now, did Mr. Wright write those letters at your request?

A Yes, he did.

Q All right. Do you recall discussing with Mr. Wright the figures which are set forth in the bottom of those letters?

A The figures at the bottom?

Q Pardon me. If you will look at Government's Exhibit 47.

A 47?

Q Yes, which you have in front of you.

A Okay, now what?

Q All right. Now what is that document again so the jury will follow?

A This is the letter that I wrote Mr. Wright asking him to send information to the mortgage companies.

Q All right. Did you discuss those figures with Mr. Wright?

A No.

Q Do you know the source of those figures from where you got them, when you composed that document to be sent to Mr. Wright?

A From my bank statements.

Q And how did you go about doing that?

A I took my bank statements and I went through them and I selected what I thought looked like to me was deposits from, for checks from my private practice before I became a judge.

Q All right. Why did you use that particular method when you were composing the letter?

A Because my slips that I had told you about was misplaced. I could not find them and I did not find them until I moved my residence on the 1st of April and then we found them. So I took my bank statements.

Q Do you know when the slips -- those are the slips which you took information and then put them in that yellow book; is that correct?

A That's correct.

Q Do you know when those slips became misplaced?

A I can only tell you generally when they became misplaced. I think they became misplaced some time in January or the month of February maybe.

Q Of what year?

A Of 1980.

Q Did there come a time when you found them again?

A I found them when I moved my residence. We found the envelope again.

Q When was that, sir?

A April, I think the last week in March of 1980 or the first week in April.

Q All right. Now, Judge Claiborne, I would like to direct your attention to the preparation of your 1980 tax return.

Did Mr. Wright prepare that?

A No, he did not.

Q Who prepared that?

A Mr. Watson.

Q Is that Mr. Jerry Watson?

A That's correct.

Q Why did you change using the services from Jay Wright to Jerry Watson for the preparation of your 1980 return?

A There was two reasons. The first reason is that I was with my former wife.

Q What was her name?

A Norma Reese.

Q How do you spell that for the record?

A R-e-e-s, Norma. And she had some papers to deliver to Mr. Watson's office. He was doing some work for her, I don't know what type, and I went in the automobile and she went upstairs and came back and she said Mr. Watson would like to meet you. And so I went up and I walked in his office and I recognized him as having seen him in my church. I had never met him formally, but I recognized his face and the place where I had seen him. I said to him, I said, "I have seen you in my church," and he said, "Sure."

He said, "I have seen you, but I have never formally met you."

So I sat down and I talked to him and wound up talking to him about 45 minutes and that's how I met him and then eventually when it came time to make my return, I took my business to him.

Q Did you have any dissatisfaction at that point in time with Mr. Jay Wright?

A Not really, no.

Q Did you have any type of problem?

A He's just a very busy man. He has a large, large business, and he's been in Las Vegas a long time and he has many, many clients and I have no complaints with him. He's a fine, warm, wonderful friend of mine and we were also in the service together in World War II and he's highly qualified and exceedingly honest.

Q All right. When you went to Mr. Watson, were you under the impression that he was an accountant?

A Yes, I was.

Q And what caused that impression?

A Well, when he went in and Creative Tax Planning on the door, it said, "Lamb - Watson Creative--Watson Creative Tax Planning, and in the course of my conversation with him, he was talking about that they were bookkeepers for several businesses, you could tell that because of the activity. And the phone calls they received while I was there.

I assumed, from the surroundings and the information that he was talking about on the telephone and everything else, including brochures that I saw there, dealing in estate planning and everything else, that he was an account.

Q And did you receive money as a result of that, from your private practice while you were on the bench during the year of 1980?

A Yes, I did.

Q I'd like to show you two exhibits, three exhibits, Government's Exhibit No. 12 and ask whether you can identify what's contained therein.

A There's two checks written by James Brown to me. One in the amount of $803.30, dated August the 6th, 1978, and one dated the 7th of November, 1980, in the amount of $7,100.19.

Q And were those checks negotiated?

A Yes, they were.

Q Where were they negotiated?

A (No response.)

Q If you can tell?

A I can't really tell. The stamp is blurred, but I mean I would see enough of it that I think it was deposited to my account in the First National Bank which is now First Interstate Bank.

Q All right. And as to the second check in the amount of $7,000-plus?

A Same.

Q That was also negotiated and the moneys were received by you; is that correct?

A That's correct.

Q And did you make a notation of those moneys being received by you?

A I sure did.

Q And did you place those in your recording book?

A Yes, I sure did.

Q All right. Now, I'd like you to take a look, your Honor, at Government's Exhibit 20, and ask what that reflects?

A That's a check from Peter Echeverria.

Q When is it dated?

A December the 31st, 1979, in the amount of $42,452.34.

Q When did you receive that check?

A On January the 3rd of that year.

Q And was that check negotiated?

A Yes, it was.

Q How was that negotiated?

A Deposited to my account at Pioneer Citizens Bank.

Q Did you make a recordation of the fact that you received those moneys?

A Yes, I did. A deposit on January the 4th.

Q Of what year?

A 1980.

Q All right. Now, I'd like you to look at what's been introduced in evidence as Government's Exhibit No. 18. I ask you whether you can identify that?

A Yes. It's a check from Hochman, Salkin and DeRoy.

Q In what amount?

A In the amount of $37,500.

Q Dated what date?

A August 15th, 1980.

Q How was that negotiated?

A Cashed at the Golden Nugget Casino.

Q Did you make a notation of that check in your recording book?

A I did.

Q Now, did you advise Mr. Watson of the fees that you received from your private practice while you were a Judge in 1980?

A I did.

Q All right. I'd like you to take a look at Defendant's Exhibit 41 and ask whether you can identify what is contained there?

A Yes. That's a statement written by me in my own handwriting pertaining to my financial affairs in the year 1980.

Q All right. Now, Judge Claiborne, I call your attention to the first page in Defendant's Exhibit 41 and ask you whether or not that entire page is in your own handwriting?

A No, it is not.

Q Would you identify that portion of the page which appears to be in somebody else's hand?

A In Paragraph 3, the words "interest earned on", Paragraph 4, the word "also," plus "why" and 345.

There's two drawings, three drawings -- well, I should say four drawings in Paragraph 4, three of those drawings were written by Mr. Watson and one by me.

Q What do the drawings reflect?

A General location of my real property, a piece of property that I sold, and my home in relation to the property.

Q All right. Is there anybody else's writing that you haven't referenced on Defendant's Exhibit 41, the first page?

A Paragraph 5 and 6 are written by somebody else.

Q And do there appear to be different types of ink on that first page?

A Yes.

Q What figures, numerical figures appear to be written in a different kind of ink from the other figures?

A The figures 345, and the figures $88,500.

Q All right. And are those figures --

A And the figure 7, and this is either a Y or a 7, I don't know, two other sevens.

Q Now, the figure $88,500, in whose hand is that?

A Mine.

Q And do you know when that was written?

A Yes, I do.

Q When was that written, sir?

A It was all done within a period of three days.

Q What does the $88,500 reflect?

A It reflects my fees that I collected from private practice before I became a judge that year.

Q Does that include the moneys which you received from Mr. Brown that you have told us about in Exhibit No. 12?

A Yes, it does.

Q And also the money you received from Mr. Echeverria?

A It includes the Echeverria check in the amount of $42,000, the Hochman check for $37,500, the Brown check for $7,000 plus, and the Brown check for 800 and some dollars.

Q Now, I'd like to turn, if you would, to the second page of Defendant's Exhibit No. 41 and ask whether or not a different ink which is in your writing?

A In my writing?

Q Yes.

A Yes. In paragraph -- well, at the bottom of the page, there's Riverside, California, property taxes, $480, Utah property, $65, that is written by me with a different pen; is that what you are talking about?

Q Yes.

A Okay.

Q Do you know whether or not when you wrote Riverside, California, property, $480 and Utah property, $64, whether you were using the same pen which composed the $88,500 figure?

A Yes.

Q Do you know whether or not you wrote that on the same day?

A Yes. At the same time in fact.

Q Are you able to tell us, Judge Claiborne, looking at the second page of Exhibit No. 41, which you have in front of you, the second page?

A Second page.

Q Right.

A All right.

Q Whether there is writing on that page which is different from your handwriting?

A Oh, yes.

Q All right. Would you tell the jury where that writing appears?

A Well, the second paragraph of that page, there is also a 7 appears in that paragraph as written by someone else. And then of course the numeral 726 and $282.94, $3,081.40, $7,916.06, $8,904, and I can't read the rest. It looks like four cents. All of those figures are written by somebody else.

Q Do you know who wrote them?

A No, I do not.

Q Do you know when they were placed on the documents?

A No, I do not.

Q Do you know the purpose they were placed on the documents?

A No, I do not. And the word "health insurance" and the words "judicial conference, bar association dues", "how about personal property?" and then the word "Contract", c-o-n-t- r.

Q Are you able to tell us whether or not those writings were placed on the document after you gave the document to Mr. Watson?

A They were.

Q Were all of your figures and notations on that document included on it at the time that you took it to Mr. Watson?

A Yes.

Q Do you recall when you took it to Mr. Watson?

A The day?

Q Yes.

A I do not.

Q Was it given to him in preparation for your return for the year 1980 which was being filed in 1981?

A Yes.

Q And was it given to Mr. Watson with those notations and figures on them before the return was filed?

A Yes.

MR. GOODMAN: Your Honor, at this time, may I pass it to the jury?

THE COURT: Well, we are going to take a break. Go ahead. Pass it for the jury to study it. Each juror is going to study all those pages?

MR. GOODMAN: No. It would be impossible. What I would like to do is just flip it by them.

THE COURT: All right. Just don't testify while you are flipping it by.

MR. GOODMAN: I won't.

THE COURT: Okay.

Ladies and gentlemen of the jury, we will take our afternoon break at this time.

(The jury was excused.)

THE COURT: All right, gentlemen, we will take about a ten minute recess.

(Whereupon a brief recess was taken.)

THE COURT: All jurors are present.

All right, Mr. Goodman.

MR. GOODMAN: Thank you, Judge.

BY MR. GOODMAN:

Q Judge Claiborne, do you have Exhibit 41 in front of you, sir?

A Yes, I do.

Q Now, did you intend that Mr. Watson should use the information in Exhibit No. 41 in preparing your 1980 return?

A Yes, I did.

Q And after you conveyed that information by delivering those documents in Exhibit 41 to Mr. Watson, did you go over the preparation of your return in detail with him?

A No.

Q Did you examine the return in any detail before it was filed?

A No.

Q At the time that return was filed, which was prepared by Mr. Watson and his associate, were you aware that it included no Schedule D -- pardon me, no Schedule C?

A No.

Q At the time the return was filed, were you aware that it included a Schedule D, which reported a capital loss from the sale of your practice?

A Yes, I did.

Q When did you at any time discuss with Mr. Watson any of the negotiations which you had concerning the sale of your practice?

A Yes, I did.

Q When did those discussions take place?

A Some time during the period of time that he was in the process of preparing my return.

Q All right. What did you tell him?

A He asked me to come to his office and I went to his office and he said that he had engaged in an accidental conversation with a lawyer and that the lawyer had told him that I had taken a terrific beating at the end of my practice, and he said, "What about it?"

And I said, "Well, I did."

And he said, "Would you tell me about it?"

And I said, "Sure."

We wound up talking about 45 minutes about it. I told him about the situation in my office between the time that I was actually nominated, the Senate confirmation hearings and the actual time that I took the bench, that I was unable to sell my practice and that I tried, but I had tried hurriedly. There wasn't enough time, that I could not dispose of it and I wound up suffering a terrific loss.

Q Did you ever discuss with him any specific figures that you had talked about with potential purchasers of your practice?

A Yes. I told him that the figures were what I wanted was $740, and I told him that I had offered it to Mr. Manzonie for $500,000 right near the end.

Q At any time, did you ever tell Mr. Watson that you donated your law library to a school in Hawaii?

A No, I don't know where he got that. I never mentioned that. He may have gotten confused because in his conversation I did tell him that I wound up giving Annette Quintana and Jim Brown and some other lawyers that I don't even know a lot of books.

Q Now, Judge Claiborne, when you were keeping your records of fees received from your private practice during the years that you were a judge, did you make entries of all of these fees in that yellow book?

A Yes, I did.

Q All right. Was that for the purpose of keeping your records so you could advise your tax preparer of the moneys which you received from your private practice?

A That was -- that and for my own personal benefit.

Q All right. Did you make that information known for the preparation of your returns for the years 1978, '79 and '80?

A Yes.

Q All right. Now, I would like to have you see Government's Exhibit 103. I am going to show this to you, sir, and if you would look at it.

Q What's that? Is that a financial disclosure report?

A It's various documents, Mr. Goodman.

Q Can you find the financial disclosure report for 1980 contained therein?

A I don't see it.

Q May I approach the witness, please. I see an amendment but I don't see the report as such.

Let me ask you this question, Judge Claiborne. Do you know how much you included in your 1980 financial disclosure report as income received from your private practice during that year?

A $88,500.

Q And that was specified when you filed the report with the Judicial Conference; is that correct?

A That's correct.

Q I'd like to show you what's been introduced as evidence as Government's Exhibit No. 8 which purports to be tax returns for the year 1980 and ask whether you recognize the same?

A Yes, I do.

Q Do you know when you signed that tax return?

A I presume on the date outside my signature, my handwriting says June 15, 1981.

Q June 15th of 1981; is that correct?

A That's correct.

Q Now, I'd like to hand you what's been introduced in evidence as Government's Exhibit No. 93 and ask whether you can identify this, sir?

A Yes. That's a refund check dated July 24, 1981, in the amount of $44,000.

Q And that's a refund check for what year? Is that for the year of 1980?

A 1980.

Q And that was in the amount of $44,256; is that correct?

A That's correct.

Q Do you have Government's Exhibit 8 in front of you?

A Yes, I do.

Q Now, directing your attention to that exhibit, which is your 1980 income tax return, what amount, if you are able to tell, appears on the return showing what should be refunded to you?

A (No response.)

Q Do you see a figure of $20,927?

A Yes.

Q All right. And is that the amount on the return which would apparently be what you would be entitled to as a refund?

A That's correct.

Q All right. Do you know why the refund which you received, which is reflected in Government's Exhibit 93, in the amount of $44,256, why the refund was $23,000 over what was shown on your return?

A Because the accountant neglected to put in the amount of taxes that I had paid when I requested the extension.

THE COURT: This is Watson's work for 1980?

THE WITNESS: Yes, sir.

When I requested an extension, I paid with the request $20,000, and there was another check for $2500 that I had paid for the estimate for the year before. And neither, neither one of those items were picked up by the accountant. And the Service Center, Internal Revenue Service Center picked up the error that I was not credited with the $23,000 that I had paid, previously paid.

BY MR. GOODMAN:

Q Were you aware, at the time that your 1980 return was filed that your accountant had omitted these funds from your return?

A No.

Q And the first time you became aware of it was when you got the refund check; is that right?

A That's correct.

Q At the time your 1980 return was filed, did you have any idea that your total income was not or may not have been included on that return?

A No, I did not.

Q Or that your total income may not have been correctly reported?

A No, I did not. I am not sure it was not correctly reported yet.

Q All right. And you were relying on Mr. Watson in the preparation of that return; is that correct?

A That's correct.

Q Now, Judge Claiborne, if you would put the tax exhibits aside, I'd like to go on to another area with you.

I'd like to call your attention, Judge Claiborne, to the year 1972 and ask you whether you knew a gentleman by the name of Sid Wyman?

A Yes, I did.

Q How did you know Mr. Wyman?

A Sid Wyman was my closest and dearest friend for 25 years or more.

Q How was Mr. Wyman employed?

A He was the chief operating officer of the Dunes Hotel. For many years he was president of it, and then he delegated those duties to Mr. Duckworth and then he became a chief operating officer of the Dunes.

Q Would you frequently spend time with Mr. Wyman?

A Sometimes almost daily.

Q And where would you be with Mr. Wyman during this period of time?

A Various places.

Q All right. Did you have dinner with him?

A Many, many times. Countless hundreds of times.

Q Did you socialize with him?

A Oh, yes. He was in my home almost weekly. He had no children of his own, no family of his own. My family became his family.

Q Was Mr. Wyman a generous person as far as you were concerned?

A Very.

Q Not only to yourself, but to your family?

A Well, yes, and he, equally, to others. Hundreds of others.

Q Did there come a time, Judge Claiborne, around Christmas of 1972 when you received something from Mr. Wyman?

A I did.

Q Where did you receive the item from Mr. Wyman?

A In his apartment.

Q How did you get there?

A How did I get there?

Q Yes.

A I drove my automobile.

Q Were you asked to come there?

A Yes. I received a call from him and he asked me to come out and I went right out.

Q Was his apartment located at the Dunes Hotel?

A That's correct.

Q He had a suite there?

A Yes. I think it was 565. I am not sure of the number.

Q When you arrived to see Mr. Wyman around Christmas of 1972, was anybody else present in Mr. Wyman's suite?

A Yes. Mr. Duckworth and Mr. Selman.

Q That's Mr. George Duckworth and Mr. Artie Selman?

A That's correct.

Q When you got to Mr. Wyman's suite, what took place?

A Well, we set down and talked a while. Mr. Wyman was in his robe and pajamas and he had just finished a three-day poker game, which was not unusual for him. He played private poker alot with alot of private players across the country that he knew. And they would gather at the Dunes and other places and play poker privately.

He had been in one of those sessions that had lasted almost three days. And we all visited and we talked. And when he called, I thought there was an urgency in his voice, but there really wasn't. That's why I went right out and I kept waiting, you know, to find

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out what he wanted me for.

Q Did there come a time when he gave you something?

A Yes, he did. He went over on a table and he took a box that was wrapped in Christmas paper and he handed it to me and he said, "This is for you. This is your Christmas present."

Q How big was the box?

A Well, I think we have had three descriptions in this trial. I would say it was about five and a half, six inches tall maybe, and approximately ten inches wide.

Q At the time that Mr. Wyman gave you the box, were Mr. Duckworth and Mr. Selman present?

A Yes, they were.

Q Did Mr. Wyman say anything to you when he gave you the box?

A Yes, he did.

Q What did he say?

A Said, "This is for you. You have spent a lifetime representing people who could not afford you and who were not worth your services."

MR. HENDRICKS: I am going to object. This is self-serving hearsay.

THE COURT: Objection sustained.

THE WITNESS: Okay.

THE COURT: You may tell what you said to Mr.

Wyman, but not what Mr. Wyman said to you.

BY MR. GOODMAN:

Q As a result of receiving this gift from Mr. Wyman, did you take the box anyplace and do something with it?

A Yes, I did.

Q Where did you take the box?

A Well, I took the box and I walked out of the room with it and went down and put it in my car and drove to the Horseshoe Club.

Q All right. Did you see anybody when you arrived at the Horseshoe Club?

A Yes. I looked for Mr. Benny Binion and he wasn't there and I saw his son instead and I called Ted.

Q After you met with Teddy Binion, what did you do?

A After I met with him, I took the -- opened the box. I knew what was in it, you know. The conversation that I cannot relate. And I opened the box and took the money out.

Q How much money was in it?

A $100,000.

Q What did you do with the money?

A We put it in two envelopes.

Q Did you do anything with the envelope?

A I wrote my name on it on the outside. I said, "This is the property of Harry Claiborne," and gave it back to

Ted and he took it into the casino cashier's office where he has a locked box.

Q Do you know what he did with it?

A I really don't know that. I presume he put it in his box.

Q Over the years from 1972 up until some time in 1978, did you have occasion to remove anything from either of the envelopes?

A On two occasions.

Q And what did you remove?

A I took $10,000 on two different occasions.

Q All right. Did you then return the envelope? Did you get the envelopes from Teddy Binion when you removed the money?

A Each time I removed the money in his presence. I didn't have to, but he was just standing there.

Q Did you then return the envelopes to Teddy Binion after you removed the money?

A Yes, I did

Q Did there come a time when you removed the remainder of the money, the $80,000 which had been left there in two envelopes?

A The last day I was in practice, I think that would be August 30 of 1978.

Q And what did you do with the moneys when you got them from Teddy Binion?

A I deposited the money in my bank account.

Q And was this the cash -- was this cash that you deposited?

A It was cash.

Q And the deposit slip reflected the fact that you deposited the cash?

A Absolutely.

Q All right. And did you ever have a conversation with Jay Wright about the $75,000 deposit which you made?

A Yes, I did.

Q When was that conversation?

A Some time during the end of the year. I was talking to him on some matter and I said -- we were talking about the accounts of my business, and I said, "$75,000, there will be a deposit on the last day of August, just before I went on the bench of $75,000," and I said, "That is not income."

Q All right. Was that the extent of your conversation?

A That was the extent of the conversation.

Q You told Mr. Wright?

A I told Mr. Wright. I may have also said, and I have always believed this, I may have said, "This is money that I had at the Horseshoe."

Q Do you recall, Judge Claiborne, what you did, at least with part of the moneys which you deposited in the bank immediately before you became a federal judge?

A I don't have any idea. I deposited the money in the bank and --

Q Did you write a check to the IRS?

A I may have. I think I did.

MR. GOODMAN: All right. Your witness.

CROSS-EXAMINATION

BY MR. HENDRICKS:

Q Judge Claiborne, you represented Joseph Conforte in 1967 as you have testified?

A That's correct.

Q Was that trial in Las Vegas?

A No, it was in Reno.

Q All right. Now, in 1977, I believe you said you represented Sally Conforte in the tax case.

A That's correct.

Q Now, you also said that when you represented Sally, from a financial standpoint, it was virtually the same thing as representing Joe because he controlled the funds; is that right?

A Well, I didn't say that. I said that in finality, that's the way it works out because he controlled the money. If you were going to get your fee, you would have to get it through Joseph Conforte, not through Sally.

Q Did you understand that in connection with your representation of Sally Conforte in 1977 that you would in fact be receiving your fee from Joseph Conforte?

A Well, nothing was specifically mentioned, but I am sure I knew that if I was going to get my money that it would come through Joe Conforte in some way. Not direct from Sally.

Q Now, between the time that you represented Joe in 1967 and the time that you represented Sally Conforte in 1977, how many times did you see Joseph Conforte?

A How many times did I see him?

Q Yes, sir.

A Well, he brought one of the prostitutes to my hotel that had murdered her pimp.

Q Excuse me, sir, that's not responsive.

THE COURT: Just answer the question, please. How many times had you seen him in that ten year period?

THE WITNESS: Probably ten.

BY MR. HENDRICKS:

Q Okay. Can you tell us where you saw him on those ten occasions?

A No, I can tell you some of them.

Q Well, could you tell us where you saw him on some of those ten occasions?

A Like I said, on the one instance with the prostitute I saw him at the Mapes in the lobby, in the mezzanine floor of the Mapes is where I talked to him.

Q All right.

A Hotel.

Q Did you stay at the Mapes from time to time between '67 and --

MR. GOODMAN: Your Honor, I am going to object. I believe Judge Claiborne was finishing his answer before he was interrupted.

THE COURT: Yes. You have asked him now. Let him answer, if you will, please, where he remembers where he may have seen Conforte in the ten year period which he's estimated about ten times.

THE WITNESS: I saw him in the coffee shop of the Mapes maybe five times during that ten-year period. I saw him in Stanley Brown's office in all probability approximately five times during that ten year period.

BY MR. HENDRICKS:

Q All right. Now, sir, when you came to Reno, between '67 and '77, would you stay at the Mapes Hotel?

A Well, sometimes. I stayed at the Riverside when it was open. I stayed at the Mapes when it was open.

Q Did you also stay at the Holiday?

A Oh, sure. Eventually I stayed at the Holiday almost exclusively in the last ten, maybe ten years.

Q Would it be fair to characterize your relationship with Joe Conforte between '67 and '77 as a personal relationship?

A Well, certainly.

Q And would it be fair to say that it was a close personal relationship?

A No, I would not say it was a close, personal relationship.

Q But you had seen him in a social context apart from any lawsuits on about ten occasions?

A Well, if you call social context, I don't ever recall ever being with Joe Conforte out for dinner or any social occasion in my life. Even when I was representing him in 1967.

But I do remember that on several occasions he came in to the coffee shop and he would talk to me. He would set down in the coffee shop and he would talk to me and we would talk about a lot of things, you know.

Q Now, Judge Claiborne, when you moved into your Reno apartment in 1978, do you recall that telephone number?

A No, I don't. 822-6175, I think.

Q How about 1715?

A That might be right.

Q Do you know whether that number was listed or not?

A I think it was unlisted.

Q Okay. Why was the number unlisted?

A Well, I really don't know. I guess I wanted an unlisted number.

Q All right. Would it be fair to say that you were concerned about people that might unnecessarily intrude on your private life?

A No, I don't think so. I don't think that has ever bothered me in my whole life. People cannot intrude on my private life. I made up my mind when I became a federal judge that I wasn't going to do like a lot of federal juges. I wasn't going to hibernate and go into hiding, discard my friends and associates and live a recluse all my life. That I was going to keep on doing just like I had been doing all my life.

Q Did you have any concern, Judge Claiborne, that after you became a judge, that litigants or people who might be associated with lawsuits, if they had your personal number in Reno, might attempt to contact you and since you had no secretary, I assume, or other person answering the phone --

A No, that never bothered me because I have talked to countless hundreds of my former clients about matters that bother them. That doesn't bother me a bit.

Q Judge Claiborne, if you had no concern --

THE COURT: What is the materiality of the unlisted number?

MR. HENDRICKS: Well, the unlisted number, your Honor, ends up on --

THE COURT: I have one in my wife's name that's listed, but I want to keep the crackpots from calling me at all hours of the night, and I have had them. I am different from Judge Claiborne for that reason. He says it was unlisted. Doesn't that answer the question?

MR. HENDRICKS: It does answer the question, your Honor.

THE COURT: All right.

BY MR. HENDRICKS:

Q Do you recall during this period of time, that is the fall of 1979, what you were, your personal telephone number was in Las Vegas?

A No, I do not.

Q Would 370-0731?

A That's it.

Q Okay. Wasn't that also an unlisted number?

A Yes.

Q All right. And while you were sitting as a judge in Reno, in the fall of 1978, do you recall the chambers number that was used?

A No, I do not.

Q Do you recall the number 784-5754?

A That sounds like it.

Q Judge Claiborne, let me show you a copy of Government's Exhibit 60, which are photocopies of the business card which is also in evidence in this case which business card was obtained by Joseph Conforte.

On the front of that card, the personal unlisted number again in Las Vegas appears, does it not? 370-0731?

A That's correct.

Q And on the back of the card is your unlisted number in Reno?

A That's correct. 826-1715.

Q And also on the back of the card are the last four digits of the number of your chambers in Reno?

A 5754.

Q Now, do you have any idea, with the exception of the one number that you have testified about, how Mr. Conforte came into the possession of these two other unlisted numbers?

A Well, I think that he testified as to one of the numbers. He never was asked about the other number. This is my writing on the top of this card. I turned the card over and on the wall in the courthouse in Portland, wrote my phone number right here.

Q Right.

A There was nothing else written on this card at that time. His testimony, if you will remember, is that he then scratched this out and he put number 1715 because he didn't want it to show that, if he was arrested and picked up by the police that he had my card. Yet, my card, my name is printed on the front, "Harry E. Claiborne."

Q Your Honor, Judge Claiborne, I remember his testimony. What I would like to do is ask for your recollection of these matters.

You testified that the day that you saw Joe Conforte up there in Portland that you really didn't want to be bothered with him; is that correct?

A I didn't say that. I said that I didn't want to take him into chambers because I had a limited amount of time I could take with him, and I didn't want him to get in there where I could not get him out easily.

I was willing to talk to him and I did talk to him in the hall. But that way I could get him, get rid of him, you know, when I got ready.

Q Well, Judge Claiborne, if you didn't want to take him into your chambers because of the state of his mind and because of the problem with time, then why would you give him access, direct access to your residence?

MR. GOODMAN: Objection, your Honor, there is nothing about the state of his mind. The Judge indicated he was busy and he didn't want to get tied up.

THE COURT: Forget about the state of mind. Answer the rest of it.

THE WITNESS: I don't know what your question is.

BY MR. HENDRICKS:

Q Why, sir, if you were concerned about not letting him into your chambers, why would you give him direct access to your residence number where conceivably he could tie you up virtually all evening long by calling you and pestering you at home?

A Well, very easily. I can hang up any time I want to.

Q Now, Judge Claiborne. I believe you testified that you were not aware of the Lowe case until about the 14th of November -- excuse me, the 14th of December, 1978.

A No, I don't think I said that. I said that I may have learned of it a few days before the 14th when I saw the calendar.

Q Let me show you the document which has been marked and introduced into evidence as Government's Exhibit 63, and ask you whether it isn't true that you signed a stay on the 3th of December?

A Yes, that would be about right.

Q Okay. Now, would it be fair to say that you don't sign stays without looking at any of the papers that are filed in connection with them?

A Yes, I think that would be a reasonable statement.

Q So then it would be fair to say, would it not, that you in fact knew about the matter the week prior to the week of the 14th?

A Yes. That would be about right.

Q And would be about the 8th day of December?

A That's correct.

Q Okay. Do you recall seeing the subpoena which was attached to the motion?

A No, I did not.

Q And you have no recollection of seeing right on the face of the subpoena?

A I may have seen it and may have read it.

Q Excuse me, sir, I haven't finished my question.

THE COURT: Let him finish the question, Judge.

THE WITNESS: Oh.

BY MR. HENDRICKS:

Q Do you have any recollection of seeing the phrase "Mustang Ranch"?

A Not really.

Q On the face of the subpoena?

A But I knew at the time that I heard this matter that both girls were from Mustang Ranch.

Q You did?

A Yes, I did.

Q And you knew that Joseph Conforte was the owner of the Mustang Ranch?

A I sure did.

Q And the person who controlled the activities of the Mustang Ranch?

A I sure did.

Q Well, Judge Claiborne, could you tell us, in light of your representation of Joseph Conforte, in light of your prior contacts with Joseph Conforte and in light of your representation of Sally Conforte, and further in light of your knowledge at the time you received these documents that this matter involved the Mustang Ranch, why did you hear this motion?

A What?

Q Why did you hear this motion, sir?

A Well, you see, you make a determination yourself that the matter involved Mustang Ranch. It did not involve Mustang Ranch. The address of the girls was Mustang Ranch. The investigation did not involve Mustang Ranch. Never. As far as I know, so I mean you make statements, there is no evidence of that fact.

Q Are you saying that with knowledge

A And if you want to accept that, that's fine.

Q I am simply asking questions.

THE COURT: Can't you answer the question, Judge, and either go ahead and rephrase it now.

BY MR. HENDRICKS:

Q Judge Claiborne, is it your testimony that although you knew it involved the Mustang Ranch, you had no idea that Mr. Conforte was involved in this investigation?

A Absolutely.

MR. GOODMAN: Objection, your Honor.

THE WITNESS: There was nothing in any single document, or nothing said in any of the arguments that he was the target of this investigation.

BY MR. HENDRICKS:

Q Did you ever inquire?

A (No response.)

Q Did you ever ask Stanley Brown?

A No. Stanley Brown?

Q Yes, sir.

A No, sir. I never had any conversation with Stanley Brown about this case in my life.

Q Or Joe Conforte? Would it be fair to say then, Judge Claiborne, that with knowledge that this whole investigation related to the Mustang Ranch and in light of your prior background with Joseph Conforte that you made no inquiry of anyone as to whether Joseph Conforte was involved?

A You keep saying investigation of Mustang Ranch. That was not an investigation of Mustang Ranch. This was an investigation of voter fraud in Storey County.

Q Do you know who the target of that investigation was?

A No, I did not.

THE COURT: I don't know whether your objection was registered.

MR. GOODMAN: Your Honor, with all due respect to Judge Claiborne, he made the objection for me.

THE COURT: Well, I just don't want this record to say that I ruled on it at all.

MR. GOODMAN: I understand, your Honor.

THE COURT: Go ahead.

BY MR. HENDRICKS:

Q Now, sir, on the 13th of December, 1978, afternoon of the 13th of December, you purchased an automobile?

A I sure did.

Q And who did you buy that car for?

A From International Motors.

Q No, no. Who did you buy it for?

A I bought it for a lady that I knew.

Q Was that Debbie Allison?

A Oh, yes.

Q The same lady that's testified here?

A Same lady.

Q Why did you buy the car that particular day?

A Why that day?

Q Yes, sir.

A Well, for the same reason that I bought shaving cream yesterday. I wanted it and I needed it.

Q You didn't need to shave with the automobile, did you?

A No. You know, why do you buy anything? I have been down there for three days, three times before I saw the car that I wanted and I went down and bought it.

Q Now, Judge Claiborne, do you know whether there are Datsun dealerships in Las Vegas?

A Yes, I know there are.

Q And did Debbie Allison at that time live in Las Vegas?

A Yes, she did.

Q And I assume that you could have purchased the car had you wanted to in Las Vegas?

A By all means.

Q And you were in Las Vegas that very next weekend?

A Sure.

Q Well, why did you purchase the car in Reno and then have it driven to Las Vegas as distinguished from purchasing the car in Las Vegas?

A Because I had been down looking at the car. I saw the car that I wanted and I bought it.

Q Isn't it fair to say that you had been looking at the car for no more than 15 minutes on the 3rd of December --

13th of December when you decided to buy it?

A No. It would not be safe to say that unless you were exceedingly reckless and Mr. Derr didn't say that. He said I had been there on three occasions looking at the car.

Q I believe he said you had been there on three occasions looking at a Mercedes.

A Well, I had been down there looking at cars on three occasions.

Q How long had you been looking at that Datsun 280Z?

A I am not sure. I think I saw it on Monday. Then it was in the back of the lot and we walked back in the back of the lot and I think that was when I first saw it. It was not cleaned up at that time, it was quite dirty. It looked like to me it had been transported by a transport truck.

Q Would you say that Mr. Derr's testimony was incorrect then?

A I don't recall him saying that I bought the Datsun in three minutes after I saw it. He may have. If he did say that, I didn't hear him say it. If he did say it, he was incorrect.

Q Now, on the 13th, you paid for that car with a check for 14,000-and-some-hundred dollars?

A Oh, that's absolutely correct.

Q And then am I correct that you went back on the bench that afternoon in Reno?

A I would say I was back on the bench by 1:30.

Q All right. And finished the matters that you had on your calendar that day?

A Yes. I would say that I -- I am not sure I finished the matters that were on my calendar. I mean I think I had a trial going.

Q Now --

A At the time and I didn't finish the trial, but I recessed around somewhere around 4:30 that afternoon.

Q Do you recall whether you were in your apartment that evening?

A Yes, I was.

Q Let me, to assist you in this matter, show you Government's Exhibit 62 which are certain telephone records reflecting calls made from your apartment.

A I was there all evening.

Q Do you recall making a call at 5:19 p.m. for a minute to 735-6955?

A What?

Q 735-6955?

A Yes.

Q And do you know whose number that is?

A Yes. That's the number of William Allison.

Q And that's Debbie Allison's father?

A Father.

Q And then I -- will you agree with me that at 5:26, you placed another telephone call to the same number?

A Yeah. This time I got her. I talked to her for five minutes.

Q And then at 5:45 p.m. another three minute phone call to 382-1600.

A Yes. I talked to Benny Binion.

Q And then at 5:47 p.m. another three-minute call to 382-1600.

A I called him back.

Q Okay. And then at 7:41 p.m., a two-minute call to 735-6955?

A Yes. That is to the Allison residence.

Q So those three calls between 5:19 and 7:41 to Debbie Allison?

A That's correct.

Q Okay. Now, Judge Claiborne, I notice there is a gap between 7:41 p.m. and 9:26 p.m.: is that correct?

A 7:41 p.m. and 9:26, yes.

Q Yes, sir. And then after 9:26, you start making calls again on 9:26, one at 9:37, one at 11:09 and one at 11:14?

A Uh-huh.

Q Was that an unusual number of calls for you to make in an evening?

A No, I don't think so. If you would look up here at November the 23rd, I think you will find that I made, started making calls at 7:47, 7:52, 7:57.

THE COURT: Those federal judges, you ought to have sense enough to know that the court reporter can't take it down that fast.

Please go back and start all over again, if you want to make that speech about all that.

THE WITNESS: No, it's not unusual, when you look over the telephone number of telephone calls I make in an evening.

BY MR. HENDRICKS:

Q Now, sir, after the hearing on the 14th of December, on the motions relating to the subpoenas that have been served on Olga Karaway and Sessina Lowe, would it be fair to say that the papers which have been filed by the attorneys received no legal attention in your office until Mr. Cornell was assigned to the matter in March of 1979?

A From what time to what time?

Q From December 14th, Judge Claiborne, until March of 1979, when Mr. Cornell testified that he was assigned the matter and started to do research.

A Well, that would be hard to say exactly when the file got the attention of Mr. Cornell. I wouldn't know. I would say maybe within three, four days because the files were transported from this office down to Las Vegas.

Q Let me try the question again, Judge Claiborne. Would it be fair to say that the file received no legal attention in your office from December 14th until Mr. Cornell began working on it?

A That would be fair to say. I did not take the file personally with me back down to Las Vegas.

Q And would it be fair to say that -- well, strike that.

Why did this matter sit, and I don't mean to use that in an unnecessary perjurative fashion, but why did it sit unattended for three months?

A When -- what are you talking about three months? The matter was ruled on, I think, within ten days after I heard the arguments.

Q Judge Claiborne, would you agree with me that from December until January is one month?

A That is correct.

Q From January until February is another month? And from February to March is a third month, so we have three months.

A Well, I think we have ten days it looks like to me when I studied the calendar when--

Q In March you testified you made a decision on the matter?

A That's correct.

Q And in making the decision, I believe your testimony was that Mr. Cornell had done legal research?

A Yes, he had done some of it.

Q And that you in fact had personally taken a look at the law in order to satisfy yourself that the decision you were going to make was one which you felt comfortable with?

A That's what he said. I am sure that's correct. I'm sure I did.

Q, Now, if you in fact were comfortable with the decision, based upon Mr. Cornell's research and upon your own personal research, why, sir, did you entertain a whole other round of reconsideration which lasted another six months?

A Why?

Q Yes, sir. Why did you stay the matter again pending these reconsideration motions?

A Well, I think I would do that in any case, and I have always done that. I don't know of any case that I have ever denied them filing a motion for reconsideration.

I always do that. Why would I not do it, Mr. Hendricks?

Q Judge Claiborne, I really don't want to get into a colloquy. I would like to ask the questions and have you respond.

THE COURT: You know he can't answer your questions. He's not permitted to.

BY MR. HENDRICKS:

Q Let me ask the question again because perhaps we have lost track of it.

If you felt satisfied that the decision you reached in March was correct, why entertain a whole other round of reconsideration motions?

A Because the attorneys felt that they had not addressed, in the first hearing, matters of, that they should have addressed and was important, and matters that I had raised they felt, at the time this matter was heard and they wanted a shot at it, and I gave it to them.

Q All right.

A And I am sure I was right. I do it with all lawyers.

Q After that, for whatever reason, the matter was unresolved until the fall of 1979; is that correct?

A I would say that. There was a long period, briefing period. Then there was a long -- quite a long delay by the Government in getting their briefs in and I believe the record shows three submissions of it, finally, it was submitted and I think I ruled on it within the 60-day period, I know that.

Q Do you recall about what month you had finally decided on the matter in 1979?

A I think it was October.

Q Now, based upon the first submissions?

A It would have been the first week around, because I recall coming back from my vacation early. I recall working on it the last week that I was supposed to be on vacation and so I think that the opinion would have been written about the 3rd, 4th, 5th in there.

Q Now, by that time, by October, you had seen the original submissions back in March and you had had an opportunity to review all the papers filed in connection with the reconsideration motions?

A By that time?

Q Yes, sir.

A Yes.

Q Now, would it be fair to say that by October, that you were, had reached a final position in your own mind regarding the merits of these various motions?

A Well, I'm sure that I had some idea which way I was going. Certainly, before I set down to dictate the decision, I knew exactly where I was going in the case.

Q After you decided the matter, a Notice of Appeal was filed?

A Yes.

Q Now -- and you granted yet an additional stay in this matter, pending appeal?

A Yes, I'm sure I did.

Q Wasn't that stay a discretionary act on your part?

A I think all stays are discretionary acts on the part of the judge.

Q So you would agree that that particular stay, like the other stays in this matter, were exercises of your discretion?

A Certainly I would agree.

Q All right.

A Yeah.

Q Why, sir, after deciding in March and then on the basis of these additional reconsideration documents filed, deciding again in October, why would you grant yet another stay in this matter?

A Why would I?

Q Yes, sir.

A Well, I -- when I granted the stay, I gave the Government an opportunity to respond and in this particular case, it was indicated by me that they were -- Government lawyers never tell you, "We agree to it, Judge," because they don't want anywhere down the line to be in the position where they have agreed to anything. So they talk like this. They say, "We are not going to file a response to that, and you do whatever you want to do with it."

Q Excuse me, but I hate to interrupt you. But I was calling for your answer as to why you granted the stay.

A I granted the stay because there was no resistence by the Government and Mr. Lutfy indicated to me that there was no statute of limitations problem, so there was no problem with the appeal and so therefore, I signed it.

Q Judge Claiborne, would you agree with me that the various stays entered in this case had the effect of entirely stopping the Grand Jury investigation?

A I would not agree with you and Mr. Lutfy and Mr. Pro both had told you already in this case it did not result in that.

Q Judge Claiborne, I am sorry, but I am not calling for your recounts of their testimony.

To your knowledge, did Sessina Lowe ever testify in the Grand Jury --

A I don't have any idea. Once the appeal was filed and I granted the stay, I heard nothing else about this case until I read in the newspaper where that Joe Conforte was, gave me $30,000 to stop the Storey County investigation.

Q To your knowledge, Judge Claiborne, did Olga Karaway ever testify before a Grand Jury investigation?

A I don't have any idea, but I am sure you know.

Q Now, Judge Claiborne, you have testified that you did see Joseph Conforte on the morning of the 8th of March, 1979?

A (No response.)

Q Just to refresh your recollection, on March 8th?

A Yes, I did.

Q On the steps of the Portland courthouse?

A Yes, I did.

Q Were you, I believe you identified the, by the picture that you were virtually at or within about ten feet of the steps of the courthouse at the time you first heard Mr. Conforte calling to you?

No. I said I thought that I was approximately three feet from the bottom step of the courthouse and to the left section of the stairway.

Q Would it be fair to say that the bottom of the steps there at the courthouse are about, say, twenty feet from the door?

A I wouldn't have any idea. I know that there's a great, a large number of steps up to the door, I know that.

Q But you have a very clear idea as to who pushed the button of the elevator that morning?

A I do know that.

Q Yes, sir, but you have no idea of how far it is from the bottom of the steps to the --

A No, I sure don't. If you want me to guess, I would say about 20 feet.

Q All right. And at the time that you began to climb the steps to the courthouse that morning, were the Johnsons behind you?

A My first awareness of the Johnsons was when I heard Mr. Conforte calling me, I turned around and I saw him coming. When I turned back around to walk up the steps, I became aware of the Johnsons. At that time or shortly after, I had taken a step or two.

Q All right. And after you walked into the courthouse that morning, you went to the elevators and I believe you and, both of the Johnsons have the specific recollection of pushing the button on the elevator?

A I am sure of it. I know I did it.

Q Now, Judge Claiborne, why is it that you have such a specific recollection of being the person who pushed a particular elevator button on one morning five years ago?

A Because I remember it vividly that I pushed the button for the elevator because I was standing right beside it. The Johnsons were immediately to my left and I remember stepping back to let Mrs. Johnson on first. I remember them being hesitant to get on the elevator and I knew it was because they didn't know whether it was proper for them to ride up the elevator with me.

Q Simply asking, however, about the button pushing.

A Uh-huh.

Q Is pushing an elevator button a vivid experience?

A Is it?

Q For you?

A No, not necessarily. I have more vivid experiences than that.

Q Are you testifying, Judge Claiborne, today, that you specifically recall being responsible for pushing the button because both of the Johnsons testified yesterday in your presence that they specifically recall five years ago you pushing that button?

A I know that I pushed the button, notwithstanding what they said.

Q Judge Claiborne, did you know that as of March of 1979 that Joe Conforte's tax case was pending in the Ninth Circuit Court of Appeals?

A Yes.

Q And did you also know that in April and May of 1979?

A Yes.

Q Okay. I believe you have testified that after the -- the oral argument was about the 16th of May?

A That's what I understand, yes.

Q And you stated this morning that some time afterwards, perhaps the next day, you had a conversation with Stanley Brown?

A Yes. Shortly after.

Q During that conversation, Judge Palmieri's name came up, came to your attention for the first time?

A That is correct.

Q All right. And you have identified, or someone identified Judge Palmieri as being a judge from New York?

A Yes. I was hear, I heard him testify.

Q Do I understand you correctly that at the time you did not know that District Court judges could sit on the Court of Appeals?

A No, I did not say that.

Q I didn't say that you said it. I simply want to know whether that was your testimony or that's your recollection?

A That District Court judges could not sit on the Court of Appeals?

Q That's correct.

A I had already sat on the Court of Appeals myself. I knew that.

Q Now, isn't it true then the case that you are talking about, was that about the first week of May, 1979?

A When I talked to Stanley Brown.

Q Yes, sir. Was that the Phone-Tel case?

A When I personally talked to him, it would have been sometime in, the 16th, 17th or 18th, I think.

Q But what I am referring your attention to is, at the time you spoke with Stanley Brown, you had already sat as a member of a panel of the Ninth Circuit?

A Yes, I had.

Q And was that in Southern California?

A I don't know.

Q Well, did that panel include Judge Kennedy and Judge Hufstedler?

A I'm not sure. In 19 -- the year '78 --'78, '79 and '80, I was sitting on the Circuit Court of Appeals nearly every other month. In other words, I was sitting from six to eight times a year on the Court of Appeals.

Q Now, do you recall when the first time was that you would have sat on the Court of Appeals?

A No, I do not, but I think it was November of 1978 because I had been on the bench about two months and I was very unsure of myself.

Q Had you met Judge Kennedy before May of 1979?

A Yes.

Q When was that?

A I had been on a Criminal Law Committee of the Ninth Circuit Conference for 15 years prior to being appointed a federal judge, and I had met Judge Kennedy somewhere along the line at the Ninth Circuit Judicial Conference.

Q Do you recall sitting with him as a member of a panel before May of 1979?

A I set with him many times, but I could not tell you that I sat with him before May.

Q Were you --

A I'm sure I did, because I had, I'm sure I had.

Q Okay. Would you say that you knew Judge Kennedy well, as of May of 1979?

A No, no. I would not say that. I don't know Judge Kennedy well now.

Q Would you say that you had a cordial relationship with Judge Kennedy?

A Yes. I would say that I had a cordial relationship with him for the simple reason that I never had any other kind of relationship with him.

Q All right. And to the best of your recollection, about how many times prior to your discussion with Stanley Brown on the 17th of May, had you been together with Judge Kennedy, either as a member of the panel or as a member of some other legal function?

A I would say once. At Judicial Conferences, you say hello and that's all. You know, you might be in the same room with them or might be at a banquet with them or some other engagement, but I don't remember ever talking privately, privately to Judge Kennedy other than when I sat with him on the Ninth Circuit.

Q All right. Now, did you -- or when did you learn that Judge Kennedy was a member of the panel that had sat on the Conforte appeal?

A I learned that on the day that Mr. Brown told me. He told me who the three-panel members were.

Q And they were Palmieri, Judge Kennedy and Judge Tang.

A And Judge Tang.

Q Now, after your conversation with, and addressing your attention to the early part of June, do you recall traveling on Saturday, the 2nd of June from the Las Vegas area to, down to Southern California?

A I sure do.

Q Did you talk with Stanley Brown the day before that?

A (No response.)

Q Is that June 1st?

A Did I talk to him?

Q Yes, sir.

A No.

Q All right. Did he --

A It would have been a Friday.

Q That's right.

A No, I did not. No, I did not. I think he called my office, but he did not get me. Somehow, I remember a message that he called.

Q Now, what was the message?

A I don't remember. That he had called.

Q Did the message call for you to return his call?

A I am not sure.

Q Were you in Southern California, the Los Angeles area, on the 3rd of June, Sunday?

A The 3rd of June?

Q Yes, sir.

A Yes, I was.

Q And you were there, I believe you have testified, on Monday, the 4th of June?

A Yes, I was.

Q And that's the same morning that Joe Conforte says he spoke to you on the phone?

A Oh, sure.

Q Is that right?

A Yes.

Q Now, do you recall what day, what time of day on the 4th you actually took the bench?

A Actually took the bench?

Q Yes, sir.

A In the afternoon.

Q It was about 1:00 o'clock, wasn't it?

A That's right.

Q You had no official duties that morning?

A No.

Q And Judge Kennedy was a member of the panel that you sat on on that occasion; is that right?

A That is correct.

Q All right. You knew then, as of the morning or the afternoon of the 4th of June that judge that you were sitting with on the panel was the same judge who was going to be one of the three judges to make the decision in the Conforte tax case?

A Yes, of course.

Q Now, shortly after that, did you have occasion to ask Judge Kennedy, call Judge Kennedy and ask him when a decision would be reached in this matter?

A I sure did.

Q Isn't it fair to say that you attempted -- that that contact was an attempt by you to obtain information regarding the Conforte case?

A No, it was not. I can tell you exactly when it was and Judge Kennedy and I have, I have a tremendous respect for him, is in error as to the circumstances.

Q With respect to that contact, didn't you know, Judge, that that contact was improper?

A No, I did not or I would not have made it. I would not make it again knowing what I know now.

Q Later that summer, isn't it true that you told Stanley Brown that Judge Kennedy had told you the case would be reversed?

A No, I did not.

Q Isn't it your testimony then that Stanley Brown has made up completely that conversation which he attributed to you?

A Well, I doubt whether he has completely made it up himself. He may have had a lot of help.

Q Is it your testimony --

A But I will tell you this, it is not true.

Q Is it your testimony that Stanley Brown's testimony from the, from this seat that you now occupy was false in every regard with respect to that particular transaction?

A I will not say his testimony was false in every regard because there might have been a few words or sentences that were truthful. But I will say to you that his testimony in that regard is not the truth.

Q This is the same Stanley Brown that you have characterized as a weak and vacillating person?

A I have not characterized him as a weak person. I have never said he was a weak person. He told me that he was not as strong as I was. That's the only way I characterized him. I don't consider him to be a strong person either.

Q Did you later in 19 -- the year of 1979, tell Stanley Brown that you had been to Judge Palmieri's house while you were in New York and that Judge Palmieri had assured you that the Conforte case would be reversed?

A That is ridiculous.

Q Is it your testimony that that statement by Stanley Brown was entirely --

A Is untrue.

Q -- untrue?

A Absolutely.

Q Now, let me, if I might, address your attention to April of 1982 so that you can follow along here. Let me show you Government's Exhibit 107. Do you recall that conversation that you had with Stanley Brown on the 13th of April, '82?

A I sure do.

Q And wouldn't it be fair to say that you talked in part about this matter? About these allegations about the Grand Jury investigation that was ongoing at that time?

A Well, let's see.

Yeah, he calls me. He tells me -- I tell him I have a sore throat and I tell him I am home because I have a sore throat.

Q I am not calling for you to recount the entire conversation. Did you know at the time that the call was initiated that the matter was being recorded?

A No, I did not know. Of course I didn't.

Q Now, do you recall, if you were to look at Page 1 there, I think you will see Mr. Brown stating or asking you, "Can you talk, um, can you get down here tonight?" And then he says, "Can you talk," and you answer, "I don't know."

A Is that the first page?

He said, "There are some things I want to tell you about," and I said, "Yeah," and he said, "You can't talk, huh?" And I said, "I don't know."

And he said, "Well, I'm upstairs here in my office."

And I said, "Uh-huh."

And he said, "And I can talk."

And I said, "Uh-huh."

And he said, "And I think there's some things you ought to know and you ought to know them right away."

And I said, "All right. Go ahead and tell me."

Q And Judge Claiborne, do you also recall suggesting that he stay all night with you and then go back on the morning flight?

A Yes. I have proposed that to him before. I think in every time he was ever down here, I said to him, "Stay overnight and you can go back the next day."

Q Would it be fair to say, Judge Claiborne, that you did not want to talk to him about this matter over the phone?

A Well, I really don't know whether I wanted to, frankly. I mean I don't think that that would, is the correct impression --

Q Well, let me ask you --

A -- that he wanted to talk to me in person. If you will read, this is his request. He wants to see me. He is bothered and he is troubled by the investigation. He is troubled by the fact that they are seizing his records. He wants to talk to me about it.

Q Judge Claiborne, why did you resist speaking with him and ask him to come down to Las Vegas?

A Resist speaking to him? I didn't resist speaking to him. I talked to him.

Q Was --

A He told me his problem and he wanted to come down and talk to me about it and I said, "Well, come on down."

Q Now, do you recall during that conversation, I believe it's on Page 5 that you admitted having seen Joe Conforte in Portland?

A Absolutely.

Q And then looking at Page 6, you said to Stanley Brown, "Any arrangements I ever had with him, I mean it was between me and him."

What was the arrangement that you were talking about, sir, in Portland?

A Fee arrangement.

Q Fee arrangement?

A Not in Portland. Fee arrangements. Any fee arrangements I ever had with Joe Conforte, I made personally with him, not through Stan Brown. That was the message that I conveyed because he began to talk about records. He said that, "They want to see my records, and I," he said, "I don't know what the hell to do."

Q Isn't -- Judge Claiborne --

A Well, wait a minute.

THE COURT: Well, now, wait a minute. Let's get control of this. Ask a question.

BY MR. HENDRICKS:

Q Do you recall saying, "You never paid any of his fees to me, and, so, you, I mean, that's the way it is."

A That's the truth. Stan Brown never paid me a quarter for Joe Conforte and any fee that I ever got from Joe Conforte in his life. He said that from this witness stand.

Q Judge Claiborne, isn't it your testimony that in October of 1978, Stanley Brown delivered to you $5,000 in cash which was owing from the work you had done on the appeal?

A By Sally Conforte, not Joe Conforte.

Q Haven't you said, sir, that when you deal with Sally and Joe Conforte, from a financial standpoint those are Joe's fees?

A Well, you are splitting hairs. Sally Conforte was my client. I talked to Stan Brown for my fee. I asked him to see if he could collect it. He did collect it. He did get it from Joe, her husband, but he did collect it and he gave it to me.

Q It's your testimony, Judge, that when you said you never paid any of his fees to me, that you had, you were not talking about the $5,000 --

A No, I was not.

Q -- that you had just received from Joseph Conforte by way of Stanley Brown?

A That is correct.

Q Now, Judge Claiborne, I notice that when this conversation took place, that you were the person who raises this question of arrangements and fees and that Stanley Brown never mentioned money prior to your bringing it up?

A Well, I don't know where you are getting that. He's talking about his records, Counsel. If you will go back, I guess your -- your statement is your conclusion of what this is. But you're incorrect. He started out by saying that his records were being subpoenaed, that they were in looking at his records and he didn't know what the hell to do.

And so I, when he's talking about records, I'm thinking about if he's being considered a witness between a matter of Conforte and myself, what would his records have to do with it. And I, then I said to him, because there would be no records of any collection of moneys by Stan Brown, or any financial arrangements between Conforte and myself in Stan Brown's office, and I said "that you were never a party to any fee arrangement that I ever had with Conforte, and you never delivered me any fees for Conforte in your life."

Q Judge Claiborne, if you had been speaking about records, I believe the documents speak for itself, but if you are speaking about records of Stanley Brown, why would you bring up the question of fees unless you knew what really happened in Portland was involving your obtaining some money of some sort from Joseph Conforte?

A Well, that would be a prosecutorial assumption on your part. I mean you asked me what my reasons that I said that and those were the reasons. Because he's talking about his records and what his records would show, and I am stating to him, "There's absolutely" -- and I also said, "There's absolutely nothing wrong with what he did when he got over there." And I said, "And that's the honest to God truth. And any arrangements I ever had with him, Stanley, you never sent one of my fees with him in your life."

And he said, "No, I never did."

Q Isn't it true, Judge Claiborne, that what you are really doing is telling Stanley that, "Don't worry about your testimony, Stanley, because whatever happened between us is him and me and so you can go into that Grand Jury and testify and not worry about it because you weren't a party to it"?

A No, sir, that is not true and you know it isn't true.

Q I do not know it is not true.

A Oh, yes, it is. You are the one man in this courtroom who knows.

THE COURT: Wait a minute, you control yourself, Judge Claiborne.

Mr. Hendricks, you control yourself.

You might be the judge in Las Vegas, but you are not the judge here, Judge Claiborne.

THE WITNESS: I know it.

THE COURT: You know that well enough.

BY MR. HENDRICKS:

Q Judge Claiborne, do you remember during the same conversation Mr. Brown asking you what he was going to do if he was asked in the Grand Jury about those assurances you had given him regarding Judge Kennedy and Judge Palmieri?

A No, he did not say that.

Q Okay. Could you look at Page 6 there?

A Page what?

Q Six, sir.

A Six?

Q Six. Where Stanley Brown says, "I don't know what he," meaning Conforte, "I don't know what he said about the rumors that you heard during the course of the appeal and how in the blank am I going to explain those if they, if he's told them about that."

A Frankly, I don't know what he was talking about.

Q Let me ask the question again.

A I will tell you something else.

Q You had no idea?

A I called him back that very evening at his home when I began to reflect and think about it. I called him back that very evening and I asked him, "What are you talking about?"

Q Judge Claiborne, in your testimony that when he asked you this question that you had no idea what he was talking about?

A I thought he was talking about when he came down and he was talking to me about the Sibla case. When he said he had heard a rumor to the effect that Judge Thompson had gone to Judge Hug and asked Judge Hug to amend his opinion is in a case because it would result in overturning the Conforte case. That is what ran through my mind in that quick session.

Q Why didn't you say, "Stan, I have no idea what you are talking about. What is this mumbo-jumbo?" You didn't say that. What you said was, "When can you come down here and we will talk about it?"

I hope I am not doing an injustice to what you said, but it's on Page 6 of Government's Exhibit 107.

A I said, "When you get down we can talk about it. We'll talk about it."

Q Why not talk over the phone about it?

A Because he's already said he wants to come down and talk to me personally. He's following orders. You people want him to talk to me personally.

Q Judge Claiborne, you have testified that you ran a law practice from the mid or late '40's until September 1st, 1978, that's a little over 30 years, right?

A I sometimes wonder, Mr. Hendricks, whether I ran a law practice or it ran me.

THE COURT: Just answer the question.

THE WITNESS: Yes, I did.

BY MR. HENDRICKS:

Q All right. While you were an attorney, you became familiar with capital gains transactions, did you not?

A Not really. I wasn't that type of lawyer.

Q Well, didn't you purchase in 1962 12,000 shares of Golden Nugget stocks?

A Yes.

Q Did you purchase 12,000 shares of Golden Nugget stock in 1962?

A Yes.

Q And in 1977 you recall you sold that?

A Yes, I did.

Q And you reported that on your '77 return as a capital gain?

A I presume I did.

Q How many tax trials did you try while you were an attorney?

A I don't know.

Q Okay. But after you became --

A I don't have any idea.

Q After you became a Judge you tried?

A I was not a tax specialist. I didn't hold myself out as a tax specialist.

Q Wouldn't you say that you are a tax specialist now?

A Would I say that?

Q Yes, sir.

A No, sir.

Q Wouldn't you say you were a tax specialist as of 1980?

A No, sir.

Q Isn't it true that in 1979 and 1980 that you tried or were responsible for more than ten tax cases as a judge?

MR. GOODMAN: I am going to object as to the form of the question. It should be one or the other.

MR. HENDRICKS: I will restate the question, your Honor.

BY MR. HENDRICKS:

Q Do you recall in January, 1979, the case of United States versus Burgess?

A United States vs. Burgess?

Q Jerry Burgess?

A That was not a tax case.

Q Wasn't that a fraud case with tax counts?

A Well, it was a fraud case, but I don't recall there was any tax counts.

Q Do you recall in about March of 1979, the case of

United States vs. Johnson?

A Are you talking about the Portland case?

Q The same gentleman that testified?

A Yes, I recall.

Q Okay. And that was a tax case?

A Yes, sir.

Q False statements?

A I think -- yes, I think that's correct.

Q And that was a trial, was it not?

A Oh, yes.

Q It was a pretty protracted trial, a couple weeks?

A It was two weeks long, if you call that protracted.

Q I believe you have testified that you worked hard on that trial, familiarizing yourself with the legal issues, the tax issues involved in the case?

A Well, I said that I worked very hard trying to keep up with the lawyers.

Q All right. Well, would you agree with me that at the end of the trial you had familiarized yourself with all the tax issues involved in that tax trial?

A Yes. I would say that.

Q All right.

A Generally.

Q Do you recall the case of United States vs. Ricky Hanna?

A (No response.)

Q About March of 1979, I believe it was an evasion case in Las Vegas.

A Yes, I do remember that case.

Q Was that a long case?

A No, it was a very short case, as I understand. I acquitted him.

Q You were the presiding judge?

A That's correct.

Q Do you recall the case of United States versus Ethel Gates in about April of 1979?

A Yes, I remember Mr. Gates's case.

Q I believe it's pronounced Ethel Gates?

A I don't know.

Q Was that a tax case?

A I am not sure whether it was a tax case or not. All I remember about the case now is that something like 70 counts.

Q Were you the presiding judge in that case?

A I was the presiding judge, but if my life depended on it right now I couldn't tell you whether it was a tax case or not.

Q Do you remember the matter of United States vs. Floyd Pattison, I believe a plea in connection with tax charges?

A Yes. I remember generally that he pled guilty.

Q All right. Do you remember United States vs. James Hamilton?

A Oh, yes. I remember that case.

Q That's an evasion case, was it not?

A Oh, yes.

Q It was tried in Las Vegas?

A Oh, yes, tried before me.

Q Were you the presiding judge?

A That's right.

Q Do you remember Harold Mitchell and Dolores Mitchell?

A Yes.

Q That's a false statement case, I believe?

A Yes.

Q Was that in about December of '79?

A Could have been.

Q And you were the presiding case judge in that case?

A Oh, sure.

Q Do you remember the case of United States vs. James Burns in about January 16th of 1980, failure to file case?

A Yes, I remember that.

Q That was a trial, wasn't it?

A Oh, yes.

Q And you were the presiding judge?

A Yes.

Q Do you remember the case of United States vs. Victor Vortees, early 1980, an evasion case?

A Yes, I remember that case.

Q That was a trial in Las Vegas?

A Yes, I do.

Q You were the presiding judge, correct?

A Yes, I was.

Q And do you recall the case of --

A No, I'm not sure. I'm not sure that Vortees was tried. He may have been. I don't know, but it seems in the back of my mind that he entered a plea.

Q Judge Claiborne, do you remember a civil tax matter which was captioned William Clyde Demming vs. United States?

A No.

Q Do you recall a case of United States vs. Augustine Gallo?

A Yes.

Q I believe he's also know as Gus Gallo?

A Yes.

Q Was than an evasion case?

A Yes.

Q And a trial in Las Vegas?

A Yes.

Q And were you the presiding judge on the case?

A That's correct.

Q And finally, United States vs. Harry Mangrum, Jr.?

A Yes, I remember that. He was a lawyer.

Q That was a trial?

A Yes.

Q And in Las Vegas?

A Yes.

Q Now, wouldn't it be fair to say, sir, that by 1980 that you were very familiar with tax --

A That I was very what?

Q Very familiar with tax law and questions involving taxation?

A Oh, yes. I would say that I would be able to comprehend most of the ordinary tax problems.

Q Now, let me, if I could, take you back to the time that you started your law practice and ask you, how much, when you started it, were you a sole practitioner?

A Yes.

Q Did you just sort of hang out a shingle?

A Yeah.

Q Rent some space and open the business?

A That's right.

Q Okay. You didn't pay anybody, you didn't buy a practice?

A No, no.

Q You just opened up one day and starting doing business?

A That's correct.

Q Now, did you purchase a client's list from anybody?

A No.

Q Over the years, between '45 to '78, did you build up your clients by your own contacts with people?

A I don't know how I built up my clientele, whether it was by personal contact or by reputation.

Q What I mean, Judge, is you didn't have to go out and purchase anybody else's client list, did you?

A No, I did not.

Q And you didn't have to go out and purchase anybody else's goodwill?

A No, I didn't.

Q Now, about the time you started, did you have occasion to purchase legal books and other materials of that sort, library materials?

A Sure.

Q And on your tax returns, did you begin depreciating those books and taking deductions, business deductions on the depreciations over the years?

A Uh-huh.

Q Okay.

A Probably.

Q And from time to time -- you don't know?

A I don't know. I really don't know. I know we took depreciation for law books. How much, when, I could not tell you.

But you do know that you did handle them, there were schedules of tax returns and you just sort of were setting up schedules and depreciating those law books?

A Correct.

Q From time to time, Judge Claiborne, between 1945 and 1973, you had occasion to acquire additional books, additional pieces for your library, did you not?

A Sure.

Q And as you acquired those things, then you put them on, you would add them to your depreciation schedules and you would start depreciating them; is that right?

A Probably. It sounds reasonable that Mr. Wright did that.

Q Now, you also had occasion to buy furniture and other items of that sort, equipment over the years?

A That's correct.

Q And I believe you said one of your, or some of you, or someone said one of your pieces of equipment was a very old chair that you had had for many years?

A I wouldn't know where that chair was.

Q You did purchase new furniture and equipment from time to time, did you not?

A Yes, I did.

Q Did you also depreciate over the years the furniture that you had acquired?

A It sounds reasonable that Mr. Wright did that.

Q Do you have any idea whether he did it or not?

A Do you want to ask me personally if I know for a fact that he did or did not, I could not tell you.

Q No, Judge, I am not asking you about the detail --

A But I am sure he did.

Q Do you know what I mean by the term "leasehold improvements"?

A Yes, I think I know.

Q All right. I believe you occupied for a long period of time, I think your testimony was something like 25 years, one piece of real estate in your office was in one place?

A That is correct.

Q Where was that, Judge?

A 108 South Third Street.

Q Okay. Did you make improvements to that property from time to time?

A Oh, sure.

Q And did you take depreciation for the improvements that you put on those?

A We may have.

Q Okay, do you know, Judge Claiborne, whether you also deducted costs of doing business like phone bills and supplies and that sort of thing?

A I'm sure of that.

Q And that would be deducted on the schedule that relates to business expenses, right?

A I'm sure of that, yes.

Q Would it be fair to say that on those schedules what you put down, your gross income, and then you deduct your business expenses and you have a net figure?

A Yes, that sounds reasonable.

Q That you use for tax purposes?

A That sounds reasonable.

Q Can you also deduct as business expenses the salaries of your employes, and by those I mean Annette Quintana, James Brown?

A Oh, sure.

Q And your secretary?

A Sure.

Q Okay. And who was the person that prepared your legal briefs?

A Who prepared my legal briefs?

Q Yes. Did Annette Quintana do a lot of that?

A She did a lot of it. I mean she did no more than I.

did. I probably wrote five briefs to her one each year.

Q Would those briefs generally be prepared in connection with representing a client?

A Well, always.

Q All right. And then you would retain them and they might be useful to you in the future, so you didn't have to duplicate research that you had done?

A It would be very useful in the future and you are correct, we wouldn't have to duplicate them, but as you well know, you never can use just a brief in one case and in another case. There's always something different about them.

Q Yes, sir.

A But generally that's true. Saves you a lot of time.

Q Now, in 1978, did you have -- you came to an agreement with Annette Quintana and James Brown regarding what you thought was an equitable division of fees that would be coming into the firm and received by them after you left the firm? Is that right?

A Well, that's rather a heavy way of putting it. I had an agreement with them that certain accounts that I had that if they wanted to collect them, that we would share from the proceeds.

Q What was the agreement generally you had with Annette Quintana with respect to the division of fees?

A I think my agreement with her was that, was only with one case and she agreed to finish that case, collect the fee and we would split it, 50/50.

Q Okay. And what was the agreement that you had with James Brown?

A I think one-third.

Q All right.

A Of what he collected, you know.

Q And was, would it be fair to say that the one-third figure represented your agreement with him as to what an equitable division of that fee would be?

A Yes, I think you could reasonably say that.

Q Okay. Now, it is also fair to say, isn't it, Judge Claiborne, that in 1978, after you became a judge, that is after September 1st, that part, the fees which you received to the extent that they were reported were reported as regular income?

A Correct.

Q And you know the difference between regular income and capital gains income?

A Yes.

Q Now, this reporting of fees in 1978, as regular ordinary income was consistent with the way in which you had always reported legal fee income, was it not?

A That is correct.

Q Now, would you agree with me that in 1978 you sold your complete library?

A Sold the complete library?

Q Yes, sir.

A No, sir.

MR. GOODMAN: What exhibit is that?

MR. HENDRICKS: Three.

BY MR. HENDRICKS:

Q I have just shown you Government's Exhibit 3. Judge Claiborne, if you would look at the 12th page of that return, and under Item 12 which reflects --

THE COURT: Which schedule?

MR. HENDRICKS: It's Part 3, gain from disposition of property and Under A there it says, reflects the sale of "complete library".

THE WITNESS: Part 3?

THE COURT: Well, could you come forward?

THE WITNESS: You are going to show me, I can't find it.

BY MR. HENDRICKS:

Q Judge Claiborne, would you agree with me that this page, and the figures carried on it reflect the complete disposition of your library in 1978?

A Yes. I see that.

Q All right. Now, also referring your attention to the sale return, let me ask you, do you recall disposing of all your furniture and equipment in 1978?

A No, I do not.

Q This is my question, Judge Claiborne. It doesn't rely --

A I know that, but if you ask me if I remember supposing and I said no, I did not.

Q Would you look at the return, two pages farther down, if you look at the library sale and then two more pages, you sill see a page which contains the notation "this equipment was given to employees that were abandoned when I became a District -- United States District Court Judge and closed my office in private practice"?

A That's correct.

Q Would you agree with me, Judge Claiborne, that this reflects the complete disposition of these, this furniture and equipment, a whole list of which is contained here.

A That is correct.

Q Now, did you, Judge Claiborne, dispose of your leasehold improvements in 1978 in the real estate?

A I presume.

Q Okay. If you turn one more -- do you still have the equipment page there?

A Yes.

Q Could you turn one more page. I believe you will see a schedule there that says "leasehold improvements".

A Yes.

Q So by the end of '78, you had agreed, regarding the fees, and everything else in the office had been disposed of by sale or abandoned or given to people?

A That is correct.

Q Okay. Now, I believe you said --

THE COURT: I think if you are going into another --

MR. HENDRICKS: Yes, sir.

THE COURT: I think it's time to recess for the day, ladies and gentlemen. I will excuse you at this time until 9:30 tomorrow morning with the same usual admonition.

Court will be in recess until 9:30.

(Whereupon the jury was excused.)

THE COURT: Nothing further, I take it, gentlemen?

MR. GOODMAN: No, your Honor.

THE COURT: All right. If there's nothing further, then the Court will be in recess until tomorrow morning at 9:30.

MR. GOODMAN: There is one other thing. I am going to give to your Honor's clerk the jury instructions which we have made reference to.

THE COURT: I thought you had delivered some.

MR. GOODMAN: I did. The ones we typed out, but I have also made reference to the Fifth Circuit, the Ninth Circuit and the Judicial Conference instructions.

I have provided copies of those books to your clerk.

HE COURT: Yes.

Mr. Shaw, you and Mr. Hendricks, do you all have anymore proposed instructions that you can think of?

MR. SHAW: The only way we would have some more, your Honor, would be in light of the ones given to us today. We haven't fully analyzed that yet.

THE COURT: I haven't read them through, but this jury is entitled to know something about the tax law without listening to you two get up there or whoever is going to argue it. Some of these matters are purely a question of law like your accounts receivable and things like that, whether they can be considered as a capital gain, which of course they can't be a capital asset at all. Anybody knows that. But I don't see any need of arguing that. I think the jury is entitled to some instructions on some of those things.

MR. SHAW: We will prepare some, your Honor.

THE COURT: All right.

If nothing further, then we will be in

recess then, gentlemen.

(Whereupon the proceedings recessed until April 3, 1984 at 9:30 a.m.)

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CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk
United States District Court
By Linda Bea Shaw
Chief Deputy Clerk

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE UNITED STATES OF AMERICA,)
)
Plaintiff,) Case No. CR-R-83-57-WEH
)
vs.) Reno, Nevada
) April 3, 1984
HARRY E. CLAIBORNE,) 9:30 o'clock, a.m.
)
Defendant.)
)

FILED
[illegible] 12 1984
CLERK, U. S. DISTRICT COURT
BY

VOLUME XIV
TRANSCRIPT OF TRIAL
Before the HONORABLE WALTER E. HOFFMAN, and a jury.

APPEARANCES:

For the Government:	STEVEN A. SHAW, ESQ. WILLIAM C. HENDRICKS, III, ESQ. JAN N. LITTLE, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ. WILLIAM J. RAGGIO, ESQ. J. RICHARD JOHNSTON, ESQ.
REPORTED BY:	SUZANNE KUES ROWE CSR NO. 127

CAPITOL REPORTERS
OFFICIAL AND GENERAL COURT REPORTERS
108 W. TELEGRAPH, CARSON CITY, NEVADA 89701
(702) 882-5322

RENO, NEVADA, TUESDAY, APRIL 3, 1984, 9:30 A.M.

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(The following proceedings were held in open court out of the presence of the jury.)

THE COURT: Is there any matter to be brought before the Court before we call the jury?

MS LITTLE: Your Honor, before the jury comes in, this relates to a matter that Mr. Johnston brought up yesterday with respect to Mr. Gologorsky's testimony. The Government has made the determination that we do not wish to inquire into these matters on cross-examination of Mr. Gologorsky, and therefore, I think this is a moot point.

THE COURT: Therefore, the memorandum you submitted is moot, I take it, and we have no issue on that?

MS LITTLE: That is correct.

THE COURT: I take it that satisfies you, Mr. Johnston?

MR. JOHNSTON: It certainly does, your Honor.

THE COURT: All right. Call the jury.

(The following proceedings were held in open court before the jury.)

THE COURT: Good morning, ladies and gentlemen.

As you recall yesterday, Judge Claiborne was on the stand when we recessed. He remains under oath and he was on cross-examination by Mr. Hendricks.

You may proceed, Mr. Hendricks.

MR. HENDRICKS: Thank you, your Honor.

HARRY E. CLAIBORNE, DEFENDANT, PREVIOUSLY SWORN

CROSS-EXAMINATION (Resumed)

BY MR. HENDRICKS:

Q Judge Claiborne, let me address your attention now to the tax year 1978. Jay Wright prepared your return, worked on your return for that year, did he not?

A That is correct.

Q And isn't it true, Judge Claiborne, that early in the year, that is the year 1980, prior to the preparation of the '79 return, you asked Jay Wright to send letters to some financial institutions regarding your assumption of a mortgage?

A Yes, I testified to that.

Q I have given you Government's Exhibit 47. I think you have it in front of you there?

A Yes.

Q Okay. Now, that's the letter that you -- or the note that you gave him, is it not?

A That's correct.

Q And you said on there that they wanted a letter from you of what my earnings were for '78, '79 and '80 to date from my private practice?

A That is correct.

Q And you said here is a tabulation taken from my deposits and authentic?

A Yes.

Q This is a letter with the exception of the writing on the side, bottom side, in your handwriting; is it not?

A And the left-hand side where it has plane cost $11,000.

Q That's in --

A All of the writing on the right-hand side, starting with TCD $10,000 and ending with the abbreviation of INT on the bottom is apparently Mr. Wright's writing.

Q Now, the total from the list you gave him at that time was $45,371.93, wasn't it?

A That's correct.

Q And that list was the list which Mr. Wright used in preparing the letters which are in Government's Exhibit 48; is that correct?

A Yes, I presume.

Q Okay. Now, Government's Exhibit 48 contains that very figure, 45,371.93, and he wrote three letters on your behalf?

A That is correct.

Q First of those letters was in March of 1980 and then there are two letters on May 22nd of 1980, correct?

A Yes.

Q So it would be fair to say that in that regard, that Mr. Wright did exactly as you had asked him to do, namely represented the figure for 1979 to be the exact total.

A That is correct.

Q Of the figures you gave him?

A Yes, it's apparent that he adopted the figures that I gave him.

Q Okay. Now, isn't it true that after the last of these letters, Mr. Wright has testified, after the 22nd of May that Mr. Wright then began in earnest to focus in on the preparation of your tax return, which was ultimately filed on the 15th of June, 1980?

MR. GOODMAN: Objection, your Honor. That would call for a conclusion on the part of Judge Claiborne as to what Mr. Wright was doing.

MR. HENDRICKS: I will rephrase the question.

BY MR. HENDRICKS:

Q Didn't you, after the 22nd of May, have conversations, further conversations with Mr. Wright as to the exact figures which should be put on your 1979 tax return?

A Yes, I did.

Q And as a result of these conversations, you went over Government's Exhibit 47, did you not, with him?

A No. I gave him a new list. He called and --

MR. HENDRICKS: Excuse me, Judge Claiborne. I am not asking for a recitation. I want to know whether or not --

THE WITNESS: All right. The answer is no.

MR. GOODMAN: Your Honor, I believe Judge Claiborne is entitled to explain the answer after he answered it.

MR. HENDRICKS: He can have all the chance in the world to explain his answers --

THE COURT: He has answered the question.

BY MR. HENDRICKS:

Q Now, Judge Claiborne, would you look at Government's Exhibit 47.

A (Complies.)

Q Now, you have identified writing down the right-hand side as being Jay Wright's and -- is that correct?

A That is correct.

Q And --

A I take it as his writing; it looks like his.

Q And the writing on the left-hand side, "plane costs $11,000"; is that correct?

A That's correct.

Q Isn't it true that some time after May 22nd, you went over Government's Exhibit 47 with Jay Wright and you made corrections to the $45,000 figure which you had previously given him?

A No. I never saw this document until you delivered the discovery from the time that I delivered it to, sent it to Mr. Wright, and that was in March, not in May.

Q Isn't it true, Judge Claiborne, that the corrections, when you account for the corrections on Government's Exhibit 47, that it brings the figure down to $22,332 and some odd cents?

A Well, I don't know that. I have never added it up. But if you have, I would accept your calculation.

Q Now, do you have Government's Exhibit 50 there in front of you?

A No, I don't. I have 47, 48, 5 and 101.

Q Now, let me ask you. This is Government's Exhibit 50, is a list of, a specific list of items, I believe you have identified in your handwriting which contains, among other things, earnings and interest earnings, medical expenses, donations, real property taxes, insurance figures and things of that sort?

A That's correct.

Q Isn't it true that this document, Government's Exhibit 50 was given by you to Mr. Wright after you had gone over Government's Exhibit 47?

A Well, I had never, I have just told you, I never went over 47 with him. I just sent it to him and he wrote the letter. I have never gone over it with him, but you are correct, Exhibit 50 was prepared several months after Exhibit 47.

Q All right. Now, is it in your handwriting; is that correct?

A Well, certainly it's in my handwriting.

Q What is the figure that's contained in there; isn't $22,332.87 contained on there right next to the notation in your handwriting, "private law practice before judgeship"?

A That is correct.

Q And, sir, isn't that exactly the figure which Mr. Wright put on your 1979 tax return?

A Yes, and it's the figure Mr. Wright testified that he gave me.

Q And that's the tax return which you signed on the 15th of June, 1980?

A Absolutely.

Q So wouldn't you agree with me then that Mr. Wright followed the instructions provided by you in your own handwriting on Government's Exhibit 50 as to the amount of your income from your private practice before you became a judge?

A Well, in the first place, I mean I don't understand your question. You asked me if that is a fact.

Q Well, I will rephrase the question.

A Part of your statement of fact is correct and part of it is grossly in error.

Q Isn't the figure that Mr. Wright put on your 1979 -- do you have the 1979 tax return in front of you?

A Is that 101 -- 5? I think Exhibit 5, yes.

Q 5, right.

A Yes.

Q What's the figure that he puts on -- do you know the figure that he puts on there as reflecting --

A Yes. He puts the $22,000 figure.

Q And that's exactly the figure you gave him in Government's Exhibit 50, is it not?

A No, it is not. The figure that I gave him in Exhibit 50 -- yes, it is Exhibit 50.

Q All right. Thank you.

A That is the same figure that I put on the document as Exhibit 50 and I secured that from him and he verified it.

Q Now, you say that Defense Exhibit 1, which is a letter dated the 11th of April, 1980, you say that in fact however, back in April you had given Mr. Wright a $41,000 figure as you remember; is that right?

A That is correct.

Q Even though Mr. Wright testified that he had never seen that document before, until Mr. Goodman showed it to him?

A I don't think that's his testimony. I think his testimony was that he saw it and he received it and then when he was brought back, you asked him if, when he first saw it and then there was some testimony about his records being, my records being lost and that he saw it two months ago when one of my counsel brought it in and asked for the original. I think that is the correct testimony.

Q It is your testimony, though, Judge Claiborne, that you knew and told Mr. Wright that your real legal fee income for '79 was $41,000 on the 11th of April, '80; is that right?

A You are one hundred percent correct.

Q And that you knew that figure in April and of course, you had that $41,000 figure in mind in May; is that correct?

A Well, you -- once again, I mean your statement of fact is partially correct and otherwise grossly in error.

Q Would you at --

A This I know exactly was I --

Q Judge, I am not asking for your speech everytime I ask a question which calls for a yes or no answer.

A Well, I am not trying to give you a jury speech. I mean you ask me questions that contain errors in the statement of fact to mean and naturally I have to correct them if I can.

Q Judge Claiborne, would you look at Government's Exhibit 101, please?

A Yes.

Q What is the date of that document?

A That document is dated May the 15th, 1980.

Q And what is that document?

A And it is my report to the Judicial Ethics Committee.

Q And does it have your own signature on it?

A It does.

Q And was it delivered and typed up by your own secretary?

A I'm sure it was.

Q All right. And it was about a month after you say you told Stanley Brown, excuse me, that you told Jay Wright, that your legal fee income was $41,000; is that right?

A Yes, it would be a month and four days.

Q All right. What is the figure that you put on that exhibit as your clients' fees while in private practice?

A $23,050.76.

Q Which is virtually identical, is it not, to the figure by Mr. Wright on your tax returns?

A It's close.

Q Well, would you tell us this.

A Do you want to know how it was calculated?

Q Was that information you were providing to the Judicial Ethics Committee false?

A False?

Q Did you intentionally file a false return?

A Of course not.

Q But it is true, is it not, that you told them, according to your version, that your income was $23,000 when you had provided and knew full well that your income was $41,000?

A Yes. Do you want to know how it was calculated?

Q Isn't it true, Judge Claiborne, that Defendant's Exhibit No. 1, which is this letter you allegedly gave to Jay Wright, was made up after --

MR. GOODMAN: Objection, your Honor, that's not the testimony. The letter was --

MR. HENDRICKS: It is testimony of the case Mr. Wright said very clearly that he never saw this document before until Mr. Goodman gave it to him.

THE COURT: The objection is overuled. Does that answer the question. Thank you.

BY MR. GOODMAN:

Q Isn't it true, Judge Claiborne, that Defense Exhibit No. 1 was made up after this investigation began?

A Is it true that it was?

Q Yes, sir.

A No, it is not true.

Q Now, Judge Claiborne, let's pass onto 1980, if you will.

In the years '77, '78 and '79, you reported your legal fees as ordinary income, correct?

A Yes.

Q And in early 1980, you provided Joseph Wright some information regarding $41,000 in legal fees which you had received at that time in 1980 and what I am referring to is Government's Exhibit 47 again?

If you will take a look at Government's Exhibit 47.

A Yes.

Q You will see at the bottom a date, 1/18/80, $41,000 and it says "fees"?

A Yes.

Q So as of early 1980, you had told Jay Wright about a $41,000 in fees received in 1980?

A That's correct.

Q And in -- would you agree with me --

A It says as of January 16th, '80, I had received $40,000.

Q Yes, sir.

A That was -- I put $41,000 on here. I actually -- it should have been $42,000 and some.

Q In April of 1981, sir, you filed an application for extension for the 1980 year?

A That's correct.

Q Let me show that to you.

Showing you Government's Exhibit 47, which appears to bear your signature, that's the application for extension which you filed?

A Yes.

Q And what was the amount of income tax that you expected to owe as declared on that extension form?

A $42,847.96.

Q Okay. So as of early in 1981, before you prepared your 1980 taxes, you did know that you had big items of legal fee income?

A I sure did.

Q And you also had filed an extension in which you estimated your tax liability to be substantial; $42,847?

A I did, yes.

Q Okay. Now --

A And I sent $22,030 with the extension.

Q You also agree with me, Judge Claiborne, that in 1980, you received other large items such as this check from Peter Echeverria for $42,000, Government's Exhibit 20?

A That's correct.

Q And this check from Hochman, Salkin and DeRoy, Government's Exhibit 18 for $37,500?

A That's correct and $7,000 from Mr. Brown.

Q Well, there's no question that in 1980, you had very substantial items of legal fee income?

A That's correct.

Q Which you had for 30 years reported as ordinary income on all your returns?

A That is correct.

Q Right?

A Right.

Q Now, in about May of 1981, you decided to get rid of Mr. Wright; is that right?

A No, I didn't decide to get rid of Mr. Wright. I hired Mr. Watson.

Q Well, Mr. Wright had been your accountant for thirty years?

A That's correct, and a good friend.

Q And you terminated that relationship, didn't you?

A Well, I didn't mean to terminate it. I just went to another accountant.

Q After thirty years relationship, you just cut him off?

A That's correct. If that's the answer you want.

Q Well, I don't want any particular answer.

A I didn't just cut him off.

Q I would like the truth.

A I just found another accountant.

Q Did you tell your personal and close friend of thirty years why you terminated that thirty-year relationship in that fashion?

A No, I don't think I talked to him.

Q Did you ever even answer his phone calls which he made to you in the spring of 1981?

A I may have or I may not have. I don't know. That's a long time ago, you know, whether you answer phone calls or you don't. I'm sure there were hundreds of phone calls I received I did not answer.

Q Now, you agree, I believe, yesterday that Mr. Wright was a well known public accountant in the Las Vegas area?

A I think Mr. Wright enjoys a very fine reputation both as a man and professionally.

Q And he has held a statewide elected office in his profession?

A Yes, you heard that. He testified to that.

Q And you discarded him in favor of Jerry Watson?

A I didn't discard him. I felt when he did his '79 return, and the '78 return, I no longer actually needed him, an accountant and he had been my accountant on a regular basis on a monthly basis. Let me answer your question.

THE COURT: You may finish.

THE WITNESS: I felt that with the large business he had and the fact that he could not get to just a return, that I was imposing on him. He was a very busy man and the reason for our way of communication by notes, which, back and forth between each other, was because he was so busy and if you went down to see Mr. Wright, I mean you had to wait for a long period of time even though you were an old customer. And I just felt, in '79, I just felt I was, he really didn't want to just do a man's return every year. Even if it had been a period of time. There was no hard feelings. I hold him in very high regard, and there was nothing wrong with it, I didn't shun him aside; he didn't shun me aside. It was just a fact that I felt that way, and I went somewhere else after I met Mr. Watson.

BY MR. HENDRICKS:

Q Did you hear his testimony about all those calls he placed to your office, never got a return?

A I heard him say that he had called a number of times and I did not reutrn his call and if he said that, that was the truth.

Q Now, if you thought that your continued relationship would be an imposition on him, why wouldn't you just call him and do him the human courtesy of telling him what you were going to do after thirty years?

A Well, you analyze that entirely different than I do. There may be many reasons why I didn't return his call. I don't know that I did not return his calls. He said that he called a number of times to the office and I did not return his calls. Right now, I cannot say to you that he did or he did not.

Q Judge Claiborne, was Mr. Watson -- he wasn't a CPA, was he?

A No, he was not I found out.

Q And he wasn't an accountant?

A No, he was not.

Q He wasn't even a bookkeeper?

A I don't know that. I know he had accountants in his office and I knew they were doing accounting work and I do know from the telephone calls that I received, it appeared that he was doing a large amount of tax work. I assumed, the very day that I walked into his office when I saw the sign on his door, the cards, the brochures, that he was an accountant.

Q Judge Claiborne, the tax return for 1980 was filed on June 15th, was it not?

A June 15?

Q Yes, sir.

A Yes, I think so.

Q Let me show it to you, it's Government's Exhibit 8.

THE COURT: That's for the calendar year 1980?

MR. HENDRICKS: Yes, your Honor.

THE COURT: And filed June 15th, 1981?

MR. HENDRICKS: Yes, your Honor.

THE COURT: All right.

BY MR. HENDRICKS:

Q Now, this was signed by you, wasn't it, Judge Claiborne?

A Yes, it was.

Q And also signed by Creative Tax Planning, Jerry Watson?

A Yes, Lamb Watson Consultants, Creative Tax Planning, signed by Jerry Watson.

Q Now, this return has a little schedule D, it has kind of a scribbled formula in pencil and if you would look at that, there's a figure on there, $250,000, $150,000 and $100,000?

A That's correct.

Q Now, did you look at that return at all before you signed it?

A I did not, and it was not signed in my chambers as Mr. Watson said. It was signed in his office.

Q Now, your view or your version is that you would have signed it really prior to the time it was filed and you never went over it?

A Prior to the time it was filled out?

Q That's right.

A No. I think -- I am sure it was filled out. I'm sure that when I signed it, it was in this present form. I went into his office and I signed it and I asked him to mail it to me or to bring it by the office, either one.

Q Did you examine the form, sir, before you filled it out -- before you signed it?

A You mean the whole return?

Q Yes, sir.

A I have never done that in my life with Mr. Wright or Mr. Watson at all.

MR. HENDRICKS: Your Honor, before I ask any additional questions, may I have the authority to simply show this Schedule D calculation to the jury very briefly?

THE COURT: Yes, it's in evidence.

BY MR. HENDRICKS:

Q Would it be fair to say, then, Judge Claiborne, that you had not examined this return personally before you signed it?

A I did not.

Q Would it be fair to say then that you had not examined the accompanying schedules and statements attached to the return?

A At the time it was signed?

Q At the time you signed it.

A No.

Q And would it also be your --

THE COURT: You mean it would not be fair to say that?

BY MR. HENDRICKS:

Q Well, did you examine the schedules and statements at the time you signed them?

A No, I did not. I told you that before.

Q So you really wouldn't have known, sir, at the time you signed it whether it was true or correct?

A No, sir.

Q You wouldn't know that?

A I assumed it was true and correct.

Q You assumed, but you would not have examined it to determine then whether it was complete?

A Well, I never did before and I never did in this instance, and I am not sure I would have understood it.

Q Judge Claiborne, let me read to you from the statement which is directly above your signature on that return. It says here, under "Penalty of perjury, I declare that I have examined this return, including accompanying schedules and statements and to the best of my information and belief, it is true, correct and complete."

Isn't that what you certified when you put your name on that return?

A Well, let's put it this way. Why you say "certification," I signed the return just under that statement.

Q Now, are you telling this jury that every year you signed returns you falsely certified that you have read over the return when in fact you had no idea what was in that return?

A You are talking about me making your speeches, you are doing the same thing. I am not telling you that.

THE COURT: Let's not give us any side remarks. Answer the question, Judge.

THE WITNESS: It was a statement. It wasn't a question.

THE COURT: Answer the question.

BY MR. HENDRICKS:

Q Judge Claiborne, is it your testimony that when you certified each and every year that you had gone over that return, that you had examined this return and that that was false?

A No. I am not saying it was false.

Q Oh.

A I'm saying that I have never in any of my time, checked every page in the return to see that it was absolutely correct.

Q Are you telling us that when you certify --

A And Mr. Wright told you the same thing.

Q -- that when you certified that you had, under penalty of perjury, examined the accompanying schedules and statements that you in fact had never done such a thing?

A Never thoroughly studied it, never thoroughly. I may have thumbed through it and that's all.

Q How could you certify, sir, that [redacted] of your knowledge and belief it is true, correct and complete?

A Because of confidence I had in the people who were preparing it. I had no compunction whatsoever in certifying it.

Q Isn't it true that in fact, Mr. Wright and Mr. Watson went over that return and you knew full well what was in that return?

A No. Mr. Wright didn't have anything to do with that return.

Q Mr. Wright went over the return for '78 and '79, just as he testified with you and you knew full well what was in '77, '78 and '79?

A He told you exactly what we did. He said we never went over them together.

Q That's not my recollection of the facts.

MR. GOODMAN: Objection, your Honor. Now Mr. Hendricks is testifying.

THE COURT: Well, now, Judge Claiborne is reciting some testimony that's been previously given and he has no right to do that.

MR. GOODMAN: I was objecting to Mr. Hendricks.

THE COURT: Well, I sustain the objection as to both.

Disregard what Judge Claiborne said about what Mr. Wright said, ladies and gentlemen. You have heard Mr. Wright testify. You have his testimony. Go ahead, Mr. Hendricks.

BY MR. HENDRICKS:

Q With respect, do you have Government's Exhibit 8 there in front of you, that's the --

A Yes, I have.

Q -- the tax return for 1980?

A Yes.

Q Would you look at this $250,000 figure that's in pencil and that zeroes and it says type here, someplace else?

A Yes, I have it. Are you talking about Schedule D?

Q Yes, sir.

A What? Yes, sir.

Q What was that $250,000 figure?

A What was it?

Q Yes, sir.

A He told me when I did confer with him that the $250,000 was the loss from my practice in 1978.

Q The loss from your practice in '78?

A That's what he told me.

Q Would that be fair market value of your business?

A I took it to be that, yes.

Q Isn't it true?

A That he set the figure at $250,000.

Q Isn't it true, Judge Claiborne, on the basis of your extensive tax matters you know full well that full market value has nothing to do with capital gain transactions?

A I did not know then when I talked to him and went over it and I do not know it now and I received many conflicting statements in that regard.

Q The $150,000 figure, what's that?

A The $150,000 is what he said it was, was that he computed, in some manner, what I received in the sale of my business, taking into account he said the monies recaptured in accounts receivables and that he estimated it to be $150,000.

Q Now, did that account receivable include your legal fees?

A Yes. I understood that.

Q All right. Those are the same legal fees?

A He referred to it as your account receivables and that's what it would have been.

Q Those are the same legal fees, are they not, Judge Claiborne that you had been reporting as ordinary income for thirty years?

A Absolutely.

Q Is that right?

A Absolutely.

Q And with respect to the rest of your business, I thought we had agreed yesterday that that had been completely disposed of in 1978?

A Mr. Wright, in the '78 and '79 returns, took a zero balance, so you would be correct.

Q Right. Now, the $100,000 figure at the bottom of that little notation, that's just subtracting the $150,000 from the 250; is that right?

A Repeat that?

Q The $100,000?

A Yes.

Q That's just the result of subtracting the $150,000 from the $250,000?

A Yes. I take it -- yes, $100,000.

Q Now, is it your testimony that in light of your experience with tax matters, that you had a good faith belief that this little scribbled notation in pencil was a serious tax calculation?

A Was what?

Q Was serious good faith tax calculation and not a sham?

A Well, yes, I think it was a serious tax calculation. I think that he believed that that was correct.

Q Don't tell us what he believed.

A Well, you said good faith calculation. He made the calculation.

Q Now, the legal fees reported on this return are zero, aren't they?

A The what?

Q Zero legal fees?

A (No response.)

Q You didn't report any?

A I don't see that he calculated any fees at all. I mean from what he told me that he did, that he included the legal fees in the $150,000 that I received in the sale of my law practice. The way he treated it.

Q Did the return, Judge Claiborne, report any legal fees on Schedule C?

A You mean designated on the return?

Q Yes, sir.

A No, I do not find them as such.

Q Didn't it surprise you that after reporting legal fees as ordinary income for thirty years, that all of a sudden you are reporting zero legal fees in a year in which you know you have massive legal fees coming in?

A No, it did not surprise me. When I discussed it with him, it didn't surprise me at all. I mean what he said, the way he treated those legal fees made sense to me.

Q All right.

A It was logical to me and it still is.

Q Did you question him about it to make absolutely sure?

A What do you mean, did I question him about it to make absolutely sure?

Q That's right.

A I couldn't have got the information how he treated this if I hadn't questioned him. I surely questioned him.

Q Did you ask a real accountant for their advice as to the proprieties as throwing a figure you called ordinary income for thirty years into a capital gains transaction?

A That's right. Or since --

Q Did you ask him?

A Since I have talked to a lot of tax experts and I get a division of opinion.

THE COURT: Both of you are talking at the same time.

MR. HENDRICKS: Your Honor, I request that the remark be stricken.

THE COURT: I understand.

The question was, since then have you talked to anyone about it and he said --

THE WITNESS: He said, have you talked to any accountants about this and I said, "Yes, I have, many of them.

THE COURT: All right.

BY MR. HENDRICKS:

Q At the time, sir, before that return was sent in, did you ask a real accountant about this --

A No, I did not.

Q -- calculation?

A I did not. I didn't talk to -- didn't talk to him about this entry or Schedule D until this investigation started.

Q Now, Judge Claiborne, your agreement with Mr. Wright was that, and I believe you said that you would deposit income into your bank account?

A That's correct.

Q Is that right?

A That is correct.

Q And would you send every month your bank deposit statements to Mr. Wright and they would prepare schedules and other documents which would be used in connection with the accounting services performed for you?

A No, that is not what I said. I said that my bank statements were mailed directly from the bank to Mr. Wright. They never even came through my hands.

Q All right. So it was your practice for all these years to deposit checks, legal fee income, into your bank account, was it not?

A Well, sure.

Q All right. And that's a standard way, in your experience that businessmen do business, is it not?

A When I was in business, that's the way I did it. I did it for the very purpose I wanted my books and records to show every penny that came through my office and it did.

Q It allows you to keep records. All right.

Now, wouldn't you agree with me that cashing checks, on the other hand, is -- does not leave as readily an accounting trail, it does not leave as clear a trail for the accounting purposes or for recordkeeping purposes?

A I don't know.

Q You have no idea?

A If you saw an elephant's tracks in the snow, I mean one guy might see it and another guy might not.

THE COURT: Let's not deal with elephant's tracks, please.

BY MR. HENDRICKS:

Q Would you agree with me, Judge Claiborne, that cash is easier to conceal than checks?

A Than checks?

Q Yes, sir.

A Well, I would, from your viewpoint, are you talking about conceal from the Government? Is that what you are talking about, to conceal from the Government?

Q I don't know. Conceal from anyone?

A No, I wouldn't say that.

Q From the IRS?

A I would say cash is much harder to conceal from someone than a check.

Q Would you agree that a cash transaction is more difficult to conceal than a deposit of a check in a bank account?

A You didn't say transaction. I'd say a cash transaction would be much easier to conceal than a check transaction.

Q Aren't you the one that's splitting hairs now, Judge Claiborne?

A Oh, no.

THE COURT: Was Mr. Wright provided with the cancelled checks and bank statements from all of your banks?

THE WITNESS: Yes, sir.

THE COURT: That's both Pioneer?

THE WITNESS: Yes, sir.

THE COURT: Were they sent directly by bank?

THE WITNESS: The First National account was sent directly from the bank, the Pioneer account was sent by me, personally.

BY MR. HENDRICKS:

Q Judge Claiborne, after you became a judge, your income dropped substantially, did it not?

A Drastically.

Q And you had a number of expenses that, although your income dropped, many of your expenses remained the same, did they not?

A I wouldn't say that. I would say my expenses dropped -- well, probably the same. Who knows.

Q Well, so after you became a judge, you starting cashing a number of checks, income checks, did you not?

A Oh, yes. Income checks?

Q Yes, sir.

A I cashed many, many checks.

Q Let me show you some exhibits here for your use.

You see a check there, September 29th, 1978, in the amount of $1207.10?

A September what?

Q September 29th, 1978. It was by James Brown?

A Yes. I see two of them.

Q You cashed the $1207.10 check at the Horseshoe?

A That's correct.

Q Do you recall, what did you do with that cash, sir?

MR. GOODMAN: Objected to as being irrelevant, your Honor.

THE WITNESS: I don't have any idea.

THE COURT: Well, what is the relevancy?

MR. HENDRICKS: I will withdraw the question, your Honor.

BY MR. HENDRICKS:

Q You see the check from Annette Quintana on January 16th, 1979?

A No, not on these exhibits.

Q Well, I believe if you open up Government's Exhibit 16 there, a $1,000 check?

A Yes. January 16, '79.

Q Yes, sir.

A Yes.

Q I believe you said many of these checks you cashed for convenience purposes?

A Well, yes, it would be for my convenience.

Q Would you, in this case, the $1,000 check that Annette Quintana had given you, would you just carry that cash around in your pocket?

A Yes.

Q Okay.' You see the check for $833.33, which is dated January 26, 1979, from James Brown?

A Yes.

Q And that was, you cashed that at the Horseshoe?

A Yes. Presumably I did.

Q Why couldn't you wait until normal banking hours and just deposit it in the bank?

A Boy, I could have waited. You know.

Q Do you see a check for -- this is Annette Quintana check, for February 12th, 1979, for $1,000?

A Yes.

Q You cashed that at the Horseshoe, did you not?

A Yes, I did.

Q Were you trying to hide anything by cashing these checks?

A (No response.)

Q This income?

A Was I trying to hide anything?

Q Yes, sir.

A Of course not.

Q Do you see a check written by James Brown, 15th of February, 1979, for $1106.66?

A Yes.

Q Did you cash that at the Horseshoe?

A I presume, yes.

Q Judge Claiborne, were you desperate for more money at this time?

A February of '79?

Q Yes, sir.

A I don't know.

Q Do you see, looking at the Annette Quintana check there, a check for $1,000, written just a few days later on the 9th of March, 1979, which you cashed at the Horseshoe Club?

A Yes.

Q And then another Annette Quintana check on the 14th of May, 1979, which you cashed at the Horseshoe?

A Yes.

Q Was that for convenience?

A Well, of course.

Q Do you see, looking at Mr. Brown, the August 31st, 1979, a check for $2,905.90?

A What date?

Q August 31st, 1979?

A I see it.

Q Did you cash that at the Horseshoe?

A Yes.

Q Why would you need to be walking around with $3,000 in cash, Judge Claiborne?

A Well, I presume that I wouldn't -- I don't think I have ever walked around with $2905.90 in my pocket. I probably cashed a check, took some of it and left the remainder of it at home, you know. I didn't walk around with $2900. In those days I would walk around with maybe $1,000 or $1500.

Q Wouldn't it have been safer just to deposit that money in the bank?

A Wouldn't it have been safer?

Q Yes, sir?

A Well, I don't know. A lot of banks are going broke. I don't know if it would have been safer or not. From security reasons, yes.

Q Is it your testimony that you didn't put the money in the bank because you had a fear that the bank was insolvent?

A I have never said that. I said I cashed them at my own whim by my own convenience.

Q Were you concerned that the bank would be broke?

A I wasn't concerned of any reasons other than cashing a check.

Q Now, would you look at the James Brown exhibit, Government's Exhibit 11. There is another $3,011.50 check which you cashed at the Horseshoe. It's dated 11/13?

A Yeah. '79.

Q 1979?

A Uh-huh.

Q There is another instance I gather --

A Are you talking about, there's two checks on that date. Which one are you talking about, the $3,000 or the 250?

Q $3,011.56.

A Yep.

Q You cashed that because it was convenient to carry $3,000 around?

A I didn't say that. I said I cashed all these checks for my own convenience.

Q Now, Judge Claiborne, would you agree with me that by mid-1980, that the fees which you had received from the practice was starting to diminish in number and some degree?

A The mid-what?

Q 1980.

A (No response.)

Q Not as many legal fees coming in from Brown, from

Quintana in 1980?

A I don't think that's correct, because I think in January of 1980 I received the $42,000 from Mr. Echeverria from the VanSickle case that we had. I think my legal fees for 1979 was $41,000 and my legal fees for the 1978 were something in the neighborhood of 20-some-odd thousand. I mean --

THE COURT: The question was directed as to Brown and Quintana.

THE WITNESS: Oh. Yes, the record shows that. That as far as Brown and Quintana are concerned, it was diminished.

BY MR. HENDRICKS:

Q Were you desperate for cash as of August of 1980?

A Desperate?

Q Yes, sir, desperate.

A Yes, I probably was.

Q Yes, sir, desperate.

A Yeah, I said that to Mr. Rothman and I probably exaggerated my position a little, but anyway I did say that to Mr. Rothman and I did need money and I had bought some property and I did need money.

Q Now, Mr. Rothman was a person you knew, he testified at your trial; is that right?

A Oh, yes.

Q You know him well?

A Very.

Q Well, close friends?

A No.

Q Friend?

A No.

Q Person that --

A I would -- I couldn't say that there is a close friendship or that, it's hard to describe the relationship. He is not a friend. He is not a person that I see all the time or that I visit all the time or I socialize with him. I have been with him in some lawsuits and against him in some lawsuits, and I have a very high regard for him and he does me.

Q Now, this $37,500 which you later received, that was a business transaction, was it not?

A (No response.)

Q For the representation of Mr. Wyman?

A A business --

Q Yes, sir.

A No. It was the Wyman estate claim.

Q Yes. It was a business matter that you were dealing with Mr. Rothman on?

A Well, you say business.

Q It was a legal matter, was it not?

A It was a legal matter, yes.

Q It was a serious business transaction, was it not?

A Oh, certainly.

Q You said -- what did you say "exaggerating your position."?

A I said I may have.

Q This is a serious matter, isn't it. This is serious today, is it not?

A Oh, certainly.

Q Are you exaggerating your position today?

A Yes. If I had taken $80,000 from Mr. Conforte, I wouldn't have needed it then.

Q Now, in Government's Exhibits 17, you say to Mr. Rothman, "Dear Frank, for the first time in my life I am desperately in need of money. Regards, Harry."

You wrote that?

A Oh, sure.

Q Is this desperation one of the reasons why you got rid of Mr. Wright?

A Of course not.

Q The desperation?

A Of course not.

Q Is that one of the reasons you discarded Mr. Wright?

A Course not.

Q Now, as a result of this letter, you received -- do you have Government's Exhibit 18 in front of you, sir? It's a check for $37,500?

A Yes.

Q That's the check you received as a result of the letter which you wrote to Mr. Rothman?

A That is correct.

Q And you cashed that check for $37,500, did you not?

A I did.

Q At the Nugget?

A I did.

Q Was it convenient for you to carry $37,500 around?

A Oh, no.

Q Why wouldn't it have been more standard procedure, more normal procedure just to go to the bank and deposit it in the bank?

A Why wouldn't it have been?

Q Yes, sir.

A It probably would have been.

Q How did you carry that $37,500 around?

A In an envelope. Took it home. I didn't carry it around.

Q Let me show you Government's Exhibit 93 for $44,236 which you got at the end of 1981. I ask you, did you cash that check?

A Yes, I did.

Q $44,256?

A That is correct.

Q Now, Judge Claiborne, let me address your attention to this transaction involving, is it a shoe box or the box in which you received, you say you received a gift in 1972?

A Yep.

Q That box, when you got it in 1972, was Christmas wrapped, was it?

A Yes, it was.

Q And you received it directly from Sidney Wyman?

A Yes, I did.

Q And do you recall when Sidney Wyman died?

A 1977, I believe or early 1978. I know that he died before I was appointed a federal judge.

Q Would it have been about June of 1978?

A Could have been.

Q Now, is your testimony that after you received this $100,000 in cash in the shoe box from Mr. Wyman, that you took it to Binions and that it was put in Ted Binion's private vault or safe at the Horseshoe Club?

A As to exactly where he put it, I don't know. I assume that. He said he put it in his own private lock box.

Q Okay. And then you left it there until the end of August of 1978 with the exception of the two occasions in which you withdrew $10,000?

A That is correct.

Q Now, in the 19 -- was it there the whole time?

A Yes.

Q The $100,000, minus the two withdrawals was there in the Horseshoe under the control, personal control of Ted Binion for the entire time from '72 until on or about the 31st of August, 1978?

A The entire period of time from the time that I got it until the time that I took the bulk of it. It was there in Mr. Binion's custody.

Q Now, in the '70 --

A Except that, I am not -- I have said '72. I am not positive in my own mind it was 1972. I talked to Mr. Duckworth and --

MR. HENDRICKS: I am going to object to any offered hearsay.

THE COURT: Yes.

MR. HENDRICKS: Regarding conversations that a witness has already testified about.

THE WITNESS: May I explain your answer.

BY MR. HENDRICKS: You will get a chance to explain your answer. Let me ask you some additional questions on this matter.

BY MR. HENDRICKS:

Q In the 1970's, Judge Claiborne you reported on your income tax return substantial interest income, did you not?

A In when?

Q In the 1970's?

A 1970's?

Q Yes, sir. For example, let me show you Government's --

A Oh, I don't know.

Q Let me show you Government's Exhibit No. 1. That's your return for 1977.

A That's correct.

Q Did you report there some interest from Pioneer Citizen's Bank?

A Yes.

Q Where did that interest come from, sir?

A I think it came from a TCD.

Q And there's some interest income there from the Nevada National Bank?

A Yes.

Q What's that from?

A TCD.

Q Okay. And a TCD is a time certificate of deposit?

A That's correct.

Q And that's a financial instrument which you purchased and which bears interest, is that right?

A That's correct.

Q And you had purchased certificates of deposit at the Pioneer Citizens Bank, had you not?

A That's correct.

Q And at the Nevada National Bank?

A That's correct.

Q And now there's also some interest income reported there from the Nevada Savings Association?

A That's correct.

Q What did that interest income come from?

A Savings accounts.

Q Okay. Now in -- let me show you Government's Exhibit 3 here, which is your income tax return for the next year, 1978.

In 1978 you reported interest income from the same sources, Pioneer Citizens Nevada National and Nevada Savings and Loan?

A Yes.

Q And was the interest that you reported in '78 from the same certificates of deposit?

A Yes, I would think so.

Q Now, in 1977, and I think you can use Government's Exhibit 1 as a reference in 1977, you had --

A Just a minute, I am getting -- they are accumulating.

Q Sure, I would be happy to.

A Number 1?

Q No. 1.

A All right.

Q You had, on that return, if you would look at Page 2, Line 54, total tax?

A To line what?

Q 54.

A Yeah.

Q The line that says "total tax"?

A $113,000.

Q $113,424.24?

A Yes.

Q And that return was sent in on June 16th, 1978, was it not?

A It has no date on my signature or Mr. Wright's signature.

Q Well --

A It was received October the 26th, 1978 in somewhere, by the IRS.

Q When you -- may I?

A There's two stamps. It says June 1978 and it says accepted as filed October 26, '78. So this must have been the date received at the Service Center, right?

Q Could I see it for a second? There's a stamp on here that says received OSC, which is probably Ogden Service Center, June 19, 1979.

A Yeah, I think that's right. So I know it must have been signed on the 15th in all probability.

Q Okay. Now, that return was sent in, it was sent in with a balance due of $74,211 in tax?

A That's correct.

Q You can see that balance due figure there on Page 2 at Line 66?

A That is correct.

Q Okay. Now, it's your testimony then, Judge Claiborne, that you didn't pay the additional $74,211, even though you had the money down at Binions, in June of 1978?

A I didn't pay it then?

Q That's right.

A Well, apparently I did not pay it then.

Q In fact, you didn't get around to paying it until August 31st?

A Yes, I think that's correct.

Q All right. Let me show you the check here, August 31st?

A That's correct.

Q In the amount of $75,443 and some odd cents?

A Yes, you are right.

Q And you didn't pay the extra tax due until more than two months after you had filed the return in June?

A That's correct.

Q Okay. So you would agree with me then that you waited two months to pay the added tax due, even though you had the money sitting right there down at Ted Binion's vault?

A (No response.)

Q Right?

A Yes.

Q And when you finally paid the tax due, you didn't pay $74,000, you actually had to pay $76,443.16?

A Yes, I think it was penalty interest.

Q So you actually had to pay an additional $2,232 in interest and penalties?

A Absolutely.

Q All right. So your testimony is, sir, that even though you had the money down at Ted Binion's vault, you waited two and a half months so that you could pay $2,232 in completely unnecessary interest and penalties?

A Do you want an answer to that?

Q Well, is that true or not?

A Well, your version of it I would say is not true.

Q True?

A I would agree with you and the statement is that I waited two months and that I paid interest.

Q Isn't it true, Judge Claiborne, that you never got this $75,000 which was deposited on August 31st until it was given to you as a loan just before the date that you deposited it in that bank account?

A It is not true.

Q All right. Now, is it true, sir, that you deposited the $75,000 in your First Interstate account on or about the 31st of August?

A That I did what?

Q That the $75,000 was deposited in your bank account on the 31st of August. Let me show you --

A Oh, that's true, yes.

Q Let me show you Government's Exhibit --

A I don't have to look at that.

Q Now, before you put that $75,000 in your account on the 31st of August, your balance was $40,119.

A Yes. I think I heard that in the trial, yes.

Q All right. Would you agree with me that $40,000 balance would not have been enough to pay the $75,000 tax liability?

A We are in agreement on that.

Q Okay. So after you deposited the $75,000, you wrote the $76,000 check against that deposit, didn't you?

A Oh, yes. It's apparent.

Q And the 75, later, the $75,000 deposit item was furnished to the Wrights in the normal course; is that right? They got the bank deposits?

A Oh, sure.

Q And they saw the $75,000 I guess?

A That's correct.

Q Now, do you recail Jay Wright asking you some time later what that item was?

A No. I called him and told him.

Q Let me show you what's been received in evidence as Government's Exhibit 43.

Now, you see the notation up there, office number at the top of the page in Jay Wright's handwriting?

A Yes.

Q That 385-6432 is a correct number, isn't it? Your office number?

A Yes.

Q And there is another number that he put up there, home, 870 --

A That's my home number.

Q And then he writes not -- with an arrow to the $75,000, he writes not income, borrowed to pay tax for 1979, for 1977.

A That's his writing.

Q And that's exactly what you told him; isn't it?

A That's correct.

Q You borrowed it to pay tax in 1977?

A That is not correct.

Q Is it true that you used it to pay tax for the 1977 tax year?

A That is correct. Some portion of it was used for that purpose.

Q Now, the '78 return which was filed makes no mention of the $75,000 as income, does it?

A The what?

Q Jay Wright treated the $75,000 exactly the way you told him to treat it, namely as a loan you had received.

A That is not correct.

Q To pay off the 1977 income tax liability?

A That is not correct.

Q All right. Do you recall in 19 -- early 1979, receiving a letter from Judge Tamm relating to your ethics and government filing form for 1978?

A I sure do.

Q Do you recall Judge Tamm in his letter saying it is necessary for the Judicial Ethics Committee to take appropriate action in all cases of nonfiling, but to insure that your nonfiling is not the result of inadvertance? "I will appreciate your informing the Committee as to your present intentions about meeting the filing requirements." Do you recall that?

A I don't recall it. That's a form letter from the Ethics Committee.

Q Let me show you Government's Exhibit 100.

Looking at the left-hand side of that document, you received, do you recall receiving that letter from Judge Tamm?

A Oh, yes.

Q It was signed by Judge Tamm?

A Yes. That's a form letter from the Committee.

Q Did you just disregard the letter as not being of any consequence?

A Did I?

Q Let me rephrase the question. After you got the letter from Judge Tamm, you knew that the Judicial Ethics Committee was taking the filing of these forms seriously, did you not?

A Well, of course.

Q And you were expected to file promptly and accurately?

A I had not -- the letter is because I had not filed my report.

Q Judge, that's not -- excuse me, that's not responsive to my question. You knew, did you not, that the, Judge Tamm expected you to file the return in an accurate and prompt fashion?

A The letter stated that he had wanted me to file my return. They thought maybe I had forgotten it and they wanted me to file it as quickly as possible.

Q That's not my question. What I want to know is what your understanding was.

A That's what my understanding was.

Q Fine. Thank you.

On the block in the return or the filing which you filed relates to report of all your loans, you reported none?

A That's correct.

Q Is that right?

A That's correct.

MR. HENDRICKS: No further questions.

THE COURT: Redirect?

MR. GOODMAN: Thank you, your Honor.

THE COURT: Well, that's all right. Go ahead.

MR. GOODMAN: Is it all right?

THE COURT: Yes.

MR. GOODMAN: Thank you.

REDIRECT EXAMINATION

BY MR. GOODMAN:

Q Judge Claiborne, when you paid your income tax in 1978, you were paying your '77 taxes, you had before you deposited the $75,000 in the bank, some $40,000 as a balance; is that correct?

A That's correct.

Q And your deposit in the bank was a cash deposit of some $75,000?

A That's correct.

Q And that was reflected on the deposit slip, was it not?

A That is correct.

Q And the moneys that you owed to the Internal Revenue Service were for some $75,000; is that correct?

A That is correct.

Q So therefore, after you wrote the check to the IRS in 1978, you had a balance of some $39,000 left?

A That is correct.

Q Now, Mr. Hendricks asked you about various checks which you received that you cashed and asked you whether or not you did that in order to hide the money from anybody. Do you recall that series of questions?

A Yes, I do.

Q Now, as to those checks which you cashed, which you received from Annette Quintana and from Jim Brown, had you made a notation that you had received those moneys at or about the time that you cashed the check?

A Yes, I did.

Q And did you make a disclosure of the fact that you received those moneys to your tax preparer for each of the years 1978, '79 and '80?

A Yes, I did and not only to them, but to the Ethics

Committee also in my financial statements.

Q And it was to the penny, as far as moneys which you received on the checks that you cashed?

A That is correct.

Q I'd like to show you, unless you have it in front of you, Judge Claiborne, Government's Exhibit No. 93? Do you have that, sir?

A I don't think I have that.

Q That would be the refund check which you received from the --

A Oh, yes. I saw it.

Q Would you tell us from whom the refund check was received?

A From the IRS.

Q Do you have it in front of you there?

A No. Give me Exhibit No. 93.

Yes, I have it.

Q Okay. Now, will you tell us who, who appears at the top of the check? Who wrote the check?

A (No response.)

Q From where does it originate?

A San Francisco.

Q All right, and is it from the United States Treasury Department?

A Yes, it is.

Q And when is the date?

A The date is July 24, 1981.

Q To whom is it made payable?

A To me.

Q And what did you do with that when you received it?

A Cashed it.

Q All right. And what name did you sign on the back of it?

A Harry E. Claiborne.

Q And where did you cash it?

A At the Nugget.

Q Golden Nugget in Las Vegas?

A That's correct.

Q Were you trying to hide that from the Government?

A Of course not.

Q Now, you indicate that you had certain discussions with Mr. Watson concerning the way he treated your 1980 tax return. When did you have these discussions with him?

Was it at the time that the return was prepared or was it at some time thereafter?

A At the time that the, this investigation began, is the only -- I mean the first serious conversation that I had with him about the return which I explored the contents of the return with him.

Q All right. So it was not at the time that the return was being prepared by his office that you had these discussions?

A No.

Q At the time that the return was being prepared by his office, did you know how they were treating the material which you had disclosed to them as far as how it was going to be reflected on your tax return?

A No, I did not. I went to his office. I answered all of his questions, he wanted to know all about the business and the sale of business, and so forth, and I gave him all that information. I did not know until I talked to him, when this investigation started how he treated the information that I gave him on that occasion.

Q And did you make a disclosure to Mr. Watson's office that you received $88,500 in legal fees?

A Absolutely.

Q And that was with those yellow pieces of paper?

A Absolutely.

Q That we went over yesterday?

A Yes.

Q All right. Are you familiar now, at this time, with the Schedule D which is attached to the 1980 return?

A Am I familiar with it?

Q Yes.

A Yes, I am familiar with it.

Q And you studied it since the investigation has began?

A What?

Q Have you studied it since you were advised that it was the subject of an investigation?

A Yes, I have studied it.

Q Making reference to that Schedule D, is any of that in your handwriting?

A No.

Q Do you even know whose handwriting it's in?

A No, I do not.

Q All right. Now, there was some reference by Mr. Hendricks to what is referred to as Defendant's Exhibit No. 1, which is your letter of April the 11th of 1980, which was delivered to Mr. Wright's office. Who delivered that?

A Judy Ahlstrom.

THE COURT: Haven't we been over this four times?

MR. GOODMAN: Well, there was some inference that perhaps this didn't take place.

THE COURT: Well, I understand, but there was no question about who delivered that letter on cross-examination.

BY MR. GOODMAN:

Q At the time the letter was delivered, was there a check made payable in the amount of $8,000 to the IRS?

A That is correct.

MR. GOODMAN: May I have the Court's indulgence please?

Nothing further, your Honor.

THE COURT: Any recross?

MR. HENDRICKS: No, your Honor.

THE COURT: Thank you, Judge Claiborne. You may stand down.

THE WITNESS: Thank you, your Honor.

(The witness was excused.)

THE COURT: Who is our next witness, gentlemen?

MR. JOHNSTON: Fred Gologorsky, your Honor.

(Whereupon the witness was duly sworn.)

FREDERIC GOLOGORSKY, DEFENSE WITNESS, SWORN

THE COURT: Would you please state your full name and spell your last name, sir.

THE WITNESS: My name is Frederic Gologorsky, G-o-l-o-g-o-r-s-k-y.

DIRECT EXAMINATION

BY MR. JOHNSTON:

Q Mr. Gologorsky, what is your residence address?

A 3026 Heligus Avenue, Berkeley, California.

Q What is your business or profession?

A I am a Certified Public Accountant.

CERTIFIED TO BE A TRUE COPY
[illegible] G. FITZGERALD, Clerk
[illegible] District Court
By Linda Lea Sharer
Chief Deputy Clerk

ORIGINA

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

THE UNITED STATES OF AMERICA,)
)
Plaintiff,) Case No. CR-R-83-57-WEH
)
vs.) Reno, Nevada
) April 4, 1984 and
HARRY E. CLAIBORNE,) April 5, 1984
)
Defendant.)
)

FILED
JUN 12 1984
CLERK, U. S. DISTRICT [illegible]

VOLUME XV
TRANSCRIPT OF TRIAL
Before the HONORABLE WALTER E. HOFFMAN, and a jury.

APPEARANCES:

For the Government:	STEVEN A. SHAW, ESQ.
	JAN N. LITTLE, ESQ.
	WILLIAM C. HENDRICKS, III, ESQ.
For the Defendant:	OSCAR B. GOODMAN, ESQ.
	WILLIAM J. RAGGIO, ESQ.
	J. RICHARD JOHNSTON, ESQ.
REPORTED BY:	SUZANNE KUES ROWE CSR NO. 127

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(702) 882-5322

MR. GOODMAN: Yes, Judge Claiborne.

THE COURT: All right.

SURREBUTTAL

HARRY E. CLAIBORNE, DEFENDANT, PREVIOUSLY SWORN

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Judge Claiborne, you heard the testimony that Mr. Wyman during his lifetime reported certain gifts of gift tax return, did you not?

A Yes.

Q And you heard they didn't report the $100,000 he gave to you in 1972; is that correct?

A Yes.

Q Did you know that he did not file a gift tax return?

A No.

Q Did you borrow the money from Mr. Wyman?

A No.

Q Did you at any time tell anyone, including Jay Wright, that you borrowed this money?

A No.

MR. GOODMAN: No further questions.

MR. HENDRICKS: No cross.

THE COURT: Thank you very much, Judge.

CERTIFIED TO BE A TRUE COPY
[illegible] C. FITZGERALD, Clerk
United States District Court
By Linda Lea Sharer
Chief Deputy Clerk

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Cleveland Ohio

MAR 5 11 30 AM '86

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs HARRY E. CLAIBORNE, Defendant.	CASE NO. CR-R-83-57

MOTION (1) TO VACATE JUDGMENT AND SENTENCE; (2) FOR EVIDENTIARY HEARING; AND (3) FOR DISCOVERY PROCEEDINGS.

COMES NOW the Defendant-Movant, HARRY E. CLAIBORNE [hereafter Defendant], by and through his attorney, OSCAR B. GOODMAN, ESQUIRE, under the provisions of 28 USC §2255 and Rule 35(A), Federal Rules of Criminal Procedure, and respectfully moves this Honorable Court for an order and judgment that the judgment of conviction and sentence heretofore imposed upon Defendant shall be vacated and held for naught.

In support hereof, Defendant shows unto the Court:

1. **Name and location of court which entered the judgment of conviction under attack:**

United States District Court for the District of Nevada, at Reno, Nevada.

2. **Date of judgment of conviction:**

October 3, 1984.

3. **Length of sentence:**

Two (2) years.

4. **Nature of offense involved (all counts):**

Count IV--violating 26 USC §7206(1) by filing an income tax return for the year 1978 falsely reporting amount of income.

Count V--violating 26 USC §7206(1) by filing an income tax return for the year 1979 falsely reporting amount of income.

5. **What was your plea?**

Not guilty.

6. **Kind of trial:**

Jury.

7. **Did you testify at the trial?**

Yes.

8. **Did you appeal from the judgment of conviction?**

Yes.

9. **If you did appeal, answer the following:**

(a) **Name of Court:**

United States Court of Appeals for the Ninth Circuit.

(b) **Result:**

Conviction affirmed.

9. (c) **Date of result:**

July 8, 1985.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?

Yes.

11. If your answer to 10 was "yes," give the following information:

(a) (1) **Name of court:**

United States Supreme Court.

(a) (2) **Nature of proceeding:**

Petition for writ of certiorari.

(a) (3) **Grounds raised:**

A. That a Title III judge is not subject to criminal prosecution in advance of impeachment and removal by Congress;

B. That the Defendant should have been allowed to prove allegations that officers of the executive misused their powers to obtain the indictment of Defendant motivated by an intent to drive him from office.

C. That the trial court wrongfully withheld Jencks/Brady material.

(a) (4) **Did you receive an evidentiary hearing on your petition, application or motion?**

No.

(a) (5) **Result:**

Petition for a writ of certiorari was denied.

(a) (6) **Date of result:**

Monday, April 21, 1986.

11. (b) (c) (d) (e) As to any second or subsequent petition, application or motion or appeal from action thereon, give the same information:

No second or subsequent petitions, applications or motions have been filed, except for the filing of certain motions in the United States Court of Appeals for the Ninth Circuit, filed substantially contemporaneously herewith, as follows:

A. Ex Parte Emergency En Banc Motion for the Designation or Assignment of a judge of the Ninth Circuit of the United States to preside over this §2255 motion;

B. Ex Parte Motion for Stay of Execution of Sentence.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same:

12. (A) GROUND ONE

Conviction obtained in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution by reason of outrageous, illegal and unconscionable conduct of agents of the federal government in the commission of a pre-indictment burglary of Defendant's home and the examination and seizure (by photography) of the contents of Defendant's personal financial diary, which was utilized in obtaining Defendant's conviction.

Supporting FACTS (tell your story briefly without citing cases or law):

Note: The following facts are derived from the affidavits appended hereto. Defendant was not a witness to the burglary.

At a time before the indictment was brought against defendant in approximately 1981, although the exact date will need confirmation by further investigation and discovery proceedings herein (which are hereby requested), Defendant's home at 1908 Plaza De La Cruz, Las Vegas, Nevada, was the subject of a burglary conceived and promoted by JOSEPH YABLONSKY, then the Special Agent in Charge [hereafter SAIC] of the Las Vegas office of the Federal Bureau of Investigation [hereafter FBI].

Participants in the burglary included STEPHEN RYBAR, then a Special Agent of the FBI; DENNIS CAPUTO, Sergeant of the Las Vegas Metropolitan Police Office [hereafter METRO]; CLIFFORD D. ISBELL, an informant for METRO working with then METRO Commander KENT CLIFFORD; and JAMES D. JOHNSON, an associate of ISBELL'S, recruited by then Commander CLIFFORD to participate in a "sting" operation with SAIC YABLONSKY.

The object of the burglary was to gain access to any personal financial records in Defendant's home.

Then FBI Special Agent RYBAR searched my home and photographed a personal financial diary located there.

This diary recorded fees received by me for work performed in my private law practice after I became a United States District Judge.

Illegal access to this information provided agents of the IRS, the FBI, and the prosecution with sources of evidence with which to establish that my legal fees were underreported on income tax returns submitted by me for the tax years of 1978 and 1979.

Details of the burglary are contained in the affidavits appended hereto of: JAMES D.[DANIEL] JOHNSON describing the plan for and execution of the burglary, and LAKE HEADLEY, an investigator, who describes the relationship of CLIFFORD D. ISBELL to then METRO Commander KENT CLIFFORD, and statements made by ISBELL regarding his participation in the burglary.

Further support for GROUND ONE is contained in the affidavits of former METRO homicide detective and polygraph examiner, CHARLES LAWRENCE LEE and his attorney, MICHAEL VACLAV STUHFF, the tax preparer, JERRY D. WATSON and his former assistant, CHARLOTTE TRAVAGLIA; and private investigator EDDIE LaRUE, illustrating the evil animus which impelled SAIC YABLONSKY to direct the burglary of Defendant's home and to perform further outrageous and unconscionable acts, harmful to many other people, in his quest to achieve Defendant's conviction.

Finally, GROUND ONE is supported by an attached copy of a grand jury subpoena served on Defendant on July 7, 1983, by LEO B. HALPER, an agent of the Internal Revenue Service, seeking production of the very document which then FBI agent STEPHEN RYBAR had photographed:

> "12. Personal diaries kept by you at any time between September 1, 1978 and the date of this subpoena [July 7, 1983]."

12. (B) **GROUND TWO**

> Convicton obtained on indictment based on grand jury testimony which the prosecutor and investigating agents knew was material and was incorrect, and which the prosecutor and investigating agents refused to allow to be corrected before the grand jury.

Supporting FACTS (tell your story briefly without citing cases or law):

Note: The following facts are drawn principally from the attached affidavits of MR. JERRY D. WATSON and MRS. CHARLOTTE TRAVAGLIA.

The indictment of Defendant with respect to Count VI, with spillover prejudicial effect as to Count V, was the result of the testimony of MR. WATSON before the Reno Grand Jury that Defendant had not disclosed his receipts of money in 1979 for legal services performed by Defendant before he became a federal district judge.

Efforts by MR. WATSON and his attorney LAWRENCE SEMENZA to correct MR. WATSON'S grand jury testimony were frustrated as outlined in MR. WATSON'S affidavit.

Defendant has recently learned that MRS. CHARLOTTE TRAVAGLIA [a former assistant to MR. WATSON and who assisted in developing Defendant's tax return for the tax year 1979] on July 8, 1983, had testified before the indicting grand jury that Defendant had made full disclosure to the WATSON office of sheets of yellow paper, stapled together, fully summarizing the legal fees he received. MRS. TRAVAGLIA further testified that many of the notations on the summarization of fees were notations she herself had made before the tax return was prepared. MRS. TRAVAGLIA reaffirmed this testimony at a follow-up interview requested by FBI agents on or about July 10 or 11, 1983, at which time MRS. TRAVAGLIA identified a copy of the yellow sheet of paper bearing her handwritten notes.

The affidavits of MR. JERRY D. WATSON and MRS. CHARLOTTE TRAVAGLIA show that the federal prosecutor and federal investigative agents allowed the indicting grand jury to retain a false impression that Defendant had not reported all Defendant's 1979 legal fees to the tax preparer, when the prosecution _knew_, from the grand jury testimony and follow-up interview of CHARLOTTE TRAVAGLIA, in FBI offices, that the "yellow page" whereon such information was itemized, was authentic, and contained handwritten notations MRS. TRAVAGLIA personally made before the preparation of the return for the tax year 1979.

Despite this knowledge, when MR. WATSON [through his attorney, LAWRENCE SEMENZA, a former United States Attorney for the District of Nevada] sought to return to the grand jury to correct his former testimony, (1) Prosecutor SHAW unreasonably demanded that MR. WATSON examine his earlier grand jury testimony in an extremely narrow time frame which MR. SEMENZA thought could not possibly be done; (2) A federal agent present addressed Prosecutor SHAW in Mr. WATSON'S presence by directing Mr. SHAW to inform MR. WATSON that MR. WATSON was a present target of the grand jury investigation; and (3) Prosecutor SHAW then refused any access by MR. WATSON to transcripts of his former testimony.

The affidavit of MR. WATSON also serves to demonstrate the intimidating and psychologically brutal tactics employed by investigating agents in this case. MR. WATSON was so intimidated and frightened that his grand jury testimony was incorrect. In advance of that testimony, MR. WATSON had been told by AGENT SKELTON: "We have talked to Mrs. Travaglia and you re going to be very surprised at what she has testified to." This information carried the totally false implication that MRS. TRAVAGLIA had given testimony before the grand jury which was damaging to Defendant.

12. (C) GROUND THREE

The sentence was imposed illegally and in an illegal manner because, by its terms, execution of the sentence will require the Defendant, a life-tenured judge under Article III of the United States Constitution to reside elsewhere than the Federal District for which he is the judge, in violation of 28 USC §1334(b), which requires a judge to reside in the district for which he is appointed. Further, execution of the sentence will functionally remove defendant from his judicial office --a power reserved to Congress under its constitutional impeachment authority.

Amplification of this GROUND THREE and authority in support thereof will be presented to the Court within approximately five (5) days after the filing of this motion.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented and give your reasons for not presenting them:

GROUND ONE was not presented because of the following circumstances:

Information relating to the burglary became available to Defendant only after his conviction; the facts pertaining to the burglary are still coming to light. Discovery proceedings and a full evidentiary hearing are necessary and hereby requested in order fully to reveal the facts of the burglary.

The treatment of MESSRS. CHARLES LAWRENCE LEE and EDDIE LaRUE was relied upon in pretrial proceedings seeking dismissal of the indictment for government misconduct, as to which Defendant was denied an evidentiary hearing. However, further details of those matters have only become fully available to Defendant since the

United States Supreme Court denied Defendant's application for a writ of certiorari and the prosecution phase of this case is closed. These matters are significant in demonstrating that SAIC YABLONSKY accepted no limits to his exercise of power--not even the limits of the United States Constitution.

GROUND TWO was not presented because of the following circumstances:

Defendant knew during the trials that an abuse of the grand jury had occurred with respect to WATSON, but only recently learned about the content of the grand jury testimony of CHARLOTTE TRAVAGLIA, who at the time of the trials was in California undergoing treatment for cancer and not available as a witness. Now, happily, MRS. TRAVAGLIA'S condition is in remission so as to render her available for information and testimony at the hearing of this motion.
During the trials, Defendant was denied access to grand jury testimony in support of the Prosecution's resistance to disclosure, except as to Jencks Act material for witnesses who took the stand in the trials. Since MRS. TRAVAGLIA was too ill to testify at the trial, and since the prosecution was upheld in its refusal to reveal grand jury materials of non-trial-witnesses, Defendant never heretofore had access to the content of MRS. TRAVAGLIA'S grand jury testimony.

Defendant had no knowledge of the content of the grand jury testimony and the follow-up FBI interview of MRS. TRAVAGLIA until approximately two-weeks before the date hereof. Defendant has also learned, only recently, of material in the WATSON affidavit regarding the harassment of MR. WATSON at the airport by AGENT HALPER. Only recently has the Defendant, through the information from MRS. TRAVAGLIA, been able to pin-point the reason MR. WATSON was not allowed to testify before the grand jury to correct his testimony.

GROUND THREE was not presented on the direct appeal because during the pendency of that appeal, and the pendency of Defendant's petition to the United States Supreme Court for a writ of certiorari, the sentence was not final. A post-appeal issue is appropriate under 28 USC §2255 and also Rule 35(a), Federal Rules of Criminal Procedure.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Contemporaneously herewith, Defendant has filed in the United States Court of Appeals for the Ninth Circuit (1) Emergency en banc motion for designation of Ninth

Circuit Judge; and (2) Emergency petition for stay of execution.

Within the next five days there will also be filed in the United States Court of Appeals for the Ninth Circuit the following: (3) Original En Banc Petition for Mandamus, prohibition and quo warranto seeking the reinstatement of Defendant's appeal from his conviction and the decision of his appeal by a panel of non-recused judges randomly assigned from the Ninth Circuit; (4) Original en banc Petition for Writ of mandamus, prohibition and quo warranto for an order disqualifying the Honorable Walter E. Hoffman, Senior United Sttes District Judge for the Eastern District of Virginia from conducting further proceedings in any matter pertaining to this District Court case.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing:

No preliminary hearing was conducted.

(b) At arraignment and plea:

OSCAR B. GOODMAN, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101

(c) At trial:

OSCAR B. GOODMAN, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101;

WILLIAM J. RAGGIO, ESQUIRE, 1 E. First Street, #1204, Reno, Nevada 89501;

J. RICHARD JOHNSTON, ESQUIRE, 1221 Broadway, Twentieth Floor, Oakland, California 94612.

(d) At sentencing:

OSCAR B. GOODMAN, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101.

(e) On appeal:

OSCAR B. GOODMAN, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101;

ANNETTE R. QUINTANA, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101.

(f) In any post-conviction proceeding:

(Petition for Certiorari)

TERENCE J. ANDERSON, ESQUIRE, c/o University of Miami School of Law, P. O. Box 248087, Coral Gables, Florida 33124;

ROBERT S. CATZ, ESQUIRE, Cleveland Marshall College of Law, Cleveland, Ohio;

Of Counsel: OSCAR B. GOODMAN, ESQUIRE, 520 South Fourth Street, Las Vegas, Nevada 89101.

(g) On appeal from any adverse ruling in a post-conviction proceeding:

None.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes. I was sentenced on the two counts described in paragraph 4 above. The sentence on Count V was a $5,000 fine and a term of two (2) years' imprisonment; the sentence of imprisonment on Count VI was for two (2) years, to run concurrently with the sentence on Count V. An additional, cumulative fine of $5,000 was imposed on Count VI.

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

No.

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WHEREFORE, Movant-Defendant prays that the Court grant him an evidentiary hearing to establish the truth of the allegations herein contained, together with pre-hearing discovery proceedings, and that the judgment of conviction of Defendant be ordered vacated and held for naught because it is the product of outrageous and unconscionable behavior by federal prosecutors and agents of the FBI and the Internal Revenue Service.

Respectfully submitted:

OSCAR B. GOODMAN, ESQUIRE
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
ATTORNEY FOR PETITIONER:
HARRY E. CLAIBORNE

Of Counsel:
Terence J. Anderson, Esquire
c/o University of Miami
School of Law
P. O. Box 248087
Coral Gables, Florida 33124
Robert S. Catz, Esquire
Cleveland Marshall College
of Law
Cleveland Ohio

CERTIFICATE OF DEFENDANT-MOVANT

I hereby certify, under penalty of perjury, that the information contained in the foregoing motion is true and correct, except those matters contained in the affidavits appended hereto, and as to the content of those affidavits, I sincerely believe them to be true.

Dated: This ___ day of May, 1986, at Las Vegas, Nevada.

Harry E. Claiborne

HARRY E. CLAIBORNE
DEFENDANT-MOVANT

MEMORANDUM OF AUTHORITY

Defendant and his counsel are aware that the Court and the rules do not invite the citation of any cases or law in support of a Section 2255 motion. However, without intending any disrespect, this motion is deemed to be supported by United States v Bogart, 783 F2d 1428 (9th Cir. 1986).

Reference is also had to United States v Russo, (D. C.D. Cal., 1972), wherein an indictment was pending against DANIEL ELLSBERG on charges he had illegally released the "Pentagon Papers." That indictment was dismissed in an unpublished opinion by the Honorable Wm. MATHEW BYRNE, JR., because of the revelation the "Plumbers Group" had burglarized the office of a psychiatrist who had seen MR. ELLSBERG in a search for evidence to discredit MR. ELLSBERG.

That case is not cited herein for its legal precedential effect, since it is unpublished (Cf. Aviles v Burgos, 783 F2d 270, 283 n.4 (1st Cir. 1986). The case is cited for its historic significance and to underscore the enormity of the conduct of federal authorities in burglarizing Defendant's home.

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Defendant will readily provide the Court with additional argument and authority in support of this motion at a time deemed appropriate by the Court, or in response to any matter filed by the Plaintiff in opposition to this motion.

Respectfully submitted:

OSCAR B. GOODMAN, ESQUIRE
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
ATTORNEY FOR PETITIONER:
HARRY E. CLAIBORNE

Of Counsel:
Terence J. Anderson, Esquire
c/o University of Miami
School of Law
P. O. Box 248087
Coral Gables, Florida 33124
Robert S. Catz, Esquire
Cleveland Marshall College
of Law
Cleveland Ohio

CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk
[illegible] States District Court

AFFIDAVIT

STATE OF NEVADA)
COUNTY OF CLARK) ss.

I, Lake W. Headley having been first duly sworn, deposes and says that:

1. I am currently employed by the law firm of Dominic P. Gentile, Ltd., Valley Bank Plaza, 300 S. Fourth Street, Suite 600, Las Vegas, Nevada 89101. Telephone (702) 386-0066.

2. I have been exclusively employed by Dominic P. Gentile as Director of Investigations since January 1983.

3. I am licensed as a private investigator in California, (California Lic. No. AQ60611) and have been so licensed for approximately ten years.

4. I currently reside in Las Vegas, Nevada.

5. In September 1984, an LVMPD officer [Sgt. Jim "Arkie" Hanley] advised me that Mr. Clifford D. Isbell wanted to meet and speak with me and gave me Mr. Isbell's home telephone number.

6. I telephoned Mr. Isbell and we arranged to meet at the Commercial Deli in Commercial Center on E. Sahara in Las Vegas.

7. On September 29, 1984, at approximately 11:30 A.M. I did in fact meet with Mr. Clifford D. Isbell at the Commercial Deli.

8. This meeting on September 29, 1984 was the first time I had met with Mr. Isbell since 1969.

9. Mr. Isbell and I spoke of many things that had transpired in Mr. Isbell's life between 1969, our last meeting

and the present time.

10. Mr. Isbell told me that he had asked to meet with me to persuade me to keep Mr. Isbell's friend and associate, LVMPD Sgt. Dennis Caputo out of the newspapers in my federal civil rights suit against Robert R. Griffin, The "Griffin Book" and LVMPD.

11. In relating how close to Sgt. Caputo Mr. Isbell is, Mr. Isbell recounted his association with Sgt. Dennis Caputo, Commander Kent Clifford and other LVMPD officers, during the tenure of John McCarthy (1978-1982), former Clark County Sheriff.

12. Mr. Isbell related to me that he, Isbell, had been "set up" by the Nevada Gaming Control investigators in a slot cheating scam at the Frontier Hotel and the Las Vegas Club, with one James D. Johnson.

13. Mr. Isbell, an ex-felon for cheating at gambling and marijuana smuggling, not wishing to return to prison, made arrangements through a Metro sgt [Sgt. Jim "Arkie" Hanley] to meet with Commander Kent Clifford to discuss Mr. Isbell's becoming a Metro Intelligence informant in exchange for dismissal of the pending slot cheating charges emanating from the Nevada Gaming Control investigation at the Frontier Hotel and the Las Vegas Club.

14. Mr. Isbell advised me that Commander Clifford had readily agreed to Mr. Isbell and Mr. Johnson becoming informants for Metro Intelligence and subsequently Commander Kent Clifford arranged for Isbell's and Mr. Johnson's charges to be dropped by the Nevada Gaming Control Board.

15. Mr. Isbell told me that one of his first

assignments had been to "get" Mr. Al Becker then Justice of the Peace.

16. Mr. Isbell related many of his successful "deals" he had participated in at THE DIRECTION OF Commander Kent Clifford and/or Sgt. Dennis Caputo between 1979 and 1982.

17. Immediately following the meeting with Mr. Isbell I went to my home and listed approximately twenty-three (23) categories that Mr. Isbell discussed at this initial meeting which lasted from approximately 11:30 A.M. until approximately 4:00 P.M. on September 29, 1984.

18. I have retained the notes I made following the meeting September 29, 1984 and have these notes in my possession at the present time.

19. Mr. Isbell told me at the above described meeting that he had been assigned to work with Sgt. Dennis Caputo and two other Metro Intelligence officers on high profile political investigations directly under the exclusive control of Commander Clifford.

20. Mr. Isbell told me that he had been treated as "another officer" by both Sgt. Caputo and Commander Kent Clifford and had been allowed access to all secret files maintained in Commander Clifford's private office as well as Sgt. Caputo's political squad files. As an example and confirmation of "secret files" to which he had access, Isbell supplied me with the transcript of a surreptitiously recorded meeting between Caputo, Clifford, and Bob Stupak the owner and operator of Bob Stupak's Vegas World.

21. Mr. Isbell also related to me at the above

described meeting that on at least one occasion, acting at the direction of Commander Kent Clifford, Isbell had purchased several ounces of cocaine from a Golden Nugget employee named Capiello.

22. The above cocaine buy was made by Mr. Isbell using his personal money, filmed in a hotel room by officers of LVMPD, and the subject Capiello was arrested, according to Mr. Isbell.

23. Following the arrest of subject Capiello, Commander Clifford allowed Mr. Isbell to keep the major part of the "evidence cocaine" knowing Isbell intended to sell this "evidence" to recover Isbell's personal money used in the Metro "controlled buy".

24. Mr. Isbell told me that only a small amount of the Capiello cocaine was booked as evidence by officers of LVMPD and the case against Capiello was subsequently not prosecuted.

25. Mr. Isbell also told me that he had attended a high level intelligence meeting held in a Showboat Hotel shortly after FBI Special-Agent-In-Charge Joseph Yablonsky came to Las Vegas.

26. Mr. Isbell told me that officers from federal, state and local law enforcement intelligence agencies attended the above meeting held at the Showboat Hotel for the purpose of meeting FBI Special-Agent-In-Charge Joseph Yablonsky, newly arrived in Las Vegas and to plan future intelligence operations in Las Vegas.

27. Mr. Isbell told me that many politically prominent Nevada figures including Senator Laxalt, Federal Judge Claiborne, Las Vegas County Commissioners, businessmen and others were targeted for investigation at the Showboat Hotel meeting.

28. Mr. Isbell told me that a major sting operation that required the purchase of the Rosebowl Racebook and Sports in Las Vegas, to be operated by Isbell, Johnson and an FBI man to be selected by Isbell and utilizing federal "Abscam" money and being conducted jointly by the FBI and LVMPD intelligence was discussed in his presence.

29. This "Operation Rosebowl" was taken to Washington, D.C. by Special-AGENT ~~Attorney~~-In-Charge Yablonsky where the plan was approved, according to Isbell.

30. "Operation Rosebowl" later was abandoned when Congress cut Abscam type funding due to adverse publicity being generated from Murray Weintraub and the Abscam FBI agents involved.

31. During the initial meeting, I told Mr. Isbell there was suspicion that a "black bag job" (illegal break-in) had been done on Judge Claiborne; Mr. Isbell nodded his head and said "yeah. . .yeah. . .yeah. . ." and he said he would talk to Sgt. Caputo about it.

32. Although this initial meeting with Mr. Isbell did not produce specific information regarding the unlawful investigative techniques used in the Judge Claiborne investigation subsequent meetings were to provide Mr. Isbell the opportunities to give me more explicit and detailed information in this matter regarding Judge Claiborne.

33. Since the initial meeting with Mr. Isbell on September 29, 1984 I have met with Mr. Isbell on the average of twice a week at various restaurants or in my office in Las Vegas.

34. During one of these meetings Mr. Isbell suggested

to me "if you want to talk with someone else regarding Claiborne's burglary, why don't you ask Jim Johnson, he was there?"

35. I have spoken to Mr. Clifford D. Isbell on the telephone at least twice a week, on the average, and sometimes daily for long periods of time within the period between September 29, 1984 and the present. The last time being when Mr. Isbell called me on April 18, 1986 at my home.

36. Over the course of these meetings and telephone conversations Mr. Isbell has described in detail a burglary in which federal Judge Harry E. Claiborne's home in Spanish Oaks in Las Vegas was illegally entered by an FBI agent, brought to Las Vegas for this and other purposes by Special-AGENT ~~Attorney~~-In-Charge Yablonsky.

37. Mr. Isbell told me that this FBI agent, Isbell and James D. Johnson were driven to Spanish Oaks by Metro Sgt. Dennis Caputo in a metro van, blue in color, where Johnson and the FBI agent exited the metro van and approached Judge Claiborne's home.

38. Mr. Isbell told me that both he and Sgt. Caputo waited in the metro van and acted as lookouts while Johnson and the FBI agent approached Judge Claiborne's home.

39. Mr. Isbell told me that when FBI Agent Rybar returned to the van, the FBI agent said he photographed some papers using a small camera which he showed to Isbell, Caputo and Johnson.

40. Although Mr. Isbell professed an inability to remember the name of the FBI agent at the various and repeated times this incident was discussed by Mr. Isbell and myself,

Isbell was able to confirm the name of the FBI agent who entered Judge Claiborne's home as FBI agent Steve Rybar when I learned this agent's name from an independent source.

41. Mr. Isbell also told me that federal attorney Steve Shaw was aware that the burglary had taken place, and photographs of Judge Claiborne's financial documents illegally obtained by the FBI were utilized to prepare the case against Judge Claiborne.

42. Mr. Clifford D. Isbell had told me many times that if questioned under oath about the burglary of Judge Claiborne as described above, he will tell the truth as he has told me and that he, Mr. Isbell, will not commit perjury.

43. I have also interviewed Mr. James D. Johnson numerous times in person and by telephone.

44. Mr. James D. Johnson has corroborated in these interviews all details provided me by Mr. Isbell in regard to the burglary of Judge Harry E. Claiborne in Spanish Oaks in Las Vegas in which Johnson waited outside as a lookout.

45. Mr. James D. Johnson has provided me with affidavits which substantiate the burglary of Judge Claiborne's home by the FBI agent, Metro Sgt., Clifford Isbell and Johnson himself.

46. Mr. Johnson has told me on many occasions that he will testify truthfully and completely if called as a witness regarding this burglary.

47. Clifford D. Isbell has been described to me by a former metro intelligence officer as "the best informant LVMPD has ever had".

48. Both Isbell and Johnson have provided me with information in other cases which have proven to be truthful and accurate.

FURTHER AFFIANT SAYETH NAUGHT.

Lake W Headley
LAKE W. HEADLEY

Subscribed and Sworn to before me this 29TH day of April, 1986.

Adele L Johansen
NOTARY PUBLIC, In and For
Said County and State.

ADELE L. [illegible]
Notary Public, State of Nevada
Appointment Recorded in Clark County
My Appointment Expires April 25, [illegible]

AFFIDAVIT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The undersigned, JAMES DANIEL JOHNSON, being first duly sworn, deposes and states that:

1. I am currently serving a four year sentence at the Southern Nevada Correctional Institute as a result of plea agreement to charges in Douglas County and Elko County, Nevada.

2. I was formerly a friend and close associate of Clifford Isbell. I was a resident of Clark County, Nevada, for approximately twelve years.

3. During the period of time that I was associated with Clifford Isbell he and I agreed to cooperate with and provide information to the Las Vegas Metropolitan Police Department and with the Federal Bureau of Investigation.

4. Clifford Isbell and I met with former Metro Intelligence Commander Kent Clifford in regard to setting up a "sting operation" by purchasing the Rose Bowl Race and Sports Book and wiring it with surveillance equipment.

5. Since the Metropolitan Police Department did not have adequate funding to support a sting operation on such large scale, Commander Clifford brought then Special Agent in Charge Joseph Yablonsky of the FBI into the proposed sting.

6. I met with Cliff Isbell and with Special Agent in Charge Yablonsky and with Commander Clifford in regard to setting up the proposed "sting" operation.

7. Special Agent in Charge Yablonsky agreed to obtain or provide federal funding for the proposed sting. In return for

federal participation, he wanted to have credit for the operation. He also wanted to have certain individuals targeted.

8. The Metropolitan Police Department had targeted several prominent Clark County political figures and business persons, including County Commissioners Manny Cortez and Thalia Dondero, John Moran, Justice of the Peace Bonaventure, as well as the Binions and Steve Wynn.

9. Yablonsky had a much shorter list of people he wanted to get. The most important to him was Judge Harry Claiborne. He also expressed his contempt for and desire to "get" Senator Paul Laxalt although it was not contemplated that Laxalt would be gotten at the Rose Bowl Sports Book. Yablonsky also wanted to get Sig Rogich and another individual whose name I cannot recall at this time.

10. Special Agent in Charge Yablonsky, while discussing his desire to get Federal Judge Claiborne at a meeting with myself and Cliff Isbell at the Jo-Jo's Restaurant on Las Vegas Boulevard near Bob Stupak's Vegas World, asked me if I knew a good "second story man," that is a burglar.

11. I recommended Ray Perrara as a burglar known to me.

12. Cliff Isbell disagreed with my suggestion of Ray Perrara, and Special Agent in Charge Yablonsky stated he would get his own man.

13. Later, I participated with Metro Intelligence Sgt. Dennis Caputo, Clifford Isbell, and another person introduced to me as a federal agent in "casing" the Claiborne residence in Spanish Oaks. The federal agent was introduced to me as Steven with the last name of Riley or similar last name. I have since seen photographs and identified that federal agent as Steve Rybar.

14. After we "cased" the Claiborne residence, Cliff Isbell, Caputo, Rybar, and I returned for the actual entry into Judge Claiborne's home.

15. Cliff Isbell and Sgt. Caputo remained in the van during the illegal entry into Claiborne's home. Rybar and I went through the gate into Judge Claiborne's courtyard.

16. Rybar went up onto a kind of step or platform in the courtyard and went through the door quickly.

17. I remained outside while Rybar was inside the Claiborne residence.

18. While Rybar was inside the Claiborne residence, I observed a vehicle with a decal on the side which I believed may have been a security service vehicle drive slowly past the Claiborne residence.

19. At the time I observed the vehicle, I briefly went into the Claiborne residence to warn Rybar that there might be "heat".

20. I went a short distance down the front hallway, then turned back and went down a side hallway to the left where I heard drawers being opened.

21. I followed that side hallway to a den where Rybar was going through drawers. I told him that there might be heat. He said he wasn't done yet. I left the residence and went outside again.

22. Shortly afterward Rybar exited the Claiborne residence with a small, black camera which he used to take photographs of Judge Claiborne's financial records.

23. While I was imprisoned at the Southern Desert

Correctional Institute at Indian Springs, in February of 1986, I was transported by federal agents to Washington, D.C., so that I could be sentenced for a federal misdemeanor charge.

24. I was transported to Terminal Island, California, El Reno, Oklahoma, and other federal facilities at federal expense for the purpose of such misdemeanor sentencing.

25. One of the facilities to which I was transported was Lewisberg, Pennsylvania. While in the infirmary at Lewisberg, Pennsylvania, I was visited by a person who refused to identify himself.

26. He told me where my mother resided, worked and went to church. He told me where my wife resided, worked and where my sons went to school. He told me that I should do a lot of forgetting before I got back to Nevada. He said that the agents who got the federal judge were just doing their job in the line of duty and he asked what I thought they would do to me for what I was doing.

27. Nevertheless, I will testify truthfully in any legal proceeding regarding my prior association and activities with former Special Agent in Charge Yablonsky, with the agent identified as Steve Rybar with former Commander Kent Clifford, former Intelligence Sgt. Dennis Caputo, and Clifford Isbell.

Further, affiant sayeth not.

James Daniel Johnson
JAMES DANIEL JOHNSON

SUBSCRIBED and SWORN to before me
this 29 day of APRIL, 1986.

Michael D. Jones
NOTARY PUBLIC in and for said
County and State

OFFICIAL SEAL
Michael D. Jones
NOTARY PUBLIC NEVADA
PRINCIPAL OFFICE IN
CLARK COUNTY
My Appointment Expires Aug. 2, 1988

AFFIDAVIT

STATE OF NEVADA)
COUNTY OF CLARK) ss.

CHARLES LAWRENCE LEE being first duly sworn, deposes and states as follows:

1. I am an Assistant Chief Investigator and a polygraph operator for the Clark County District Attorney.

2. I was previously employed as a Las Vegas Metropolitan Police Department homicide investigator and polygraph operator.

3. In or about April, 1980, I was subpoenaed to testify in Las Vegas, Nevada, before a federal grand jury, in reference to a polygraph examination I had administered to Federal Judge Harry E. Claiborne in 1977.

4. I was questioned before the Federal Grand Jury by Federal Strike Force prosecutor Stan Hunterton.

5. Mr. Hunterton advised me of my Miranda rights before the Grand Jury. I testified fully and to the best of my recollection about the polygraph examination I had administered to Judge Harry E. Claiborne approximately three years earlier. I testified that, in my opinion, Judge Claiborne had been truthful in his responses.

6. During the following several months, in approximately June or July of 1980, I was summoned to the office of then Sheriff John McCarthy.

7. Sheriff John McCarthy informed me that he had been visited by two Federal Strike Force agents sent by [FBI, Special-Agent-In-Charge Joseph] Yablonsky the preceding day.

8. Sheriff John McCarthy informed me that Yablonsky considered me an "uncooperative witness" and that he was going to "come down on me like a ton of bricks".

9. I have learned, through materials released to me on or about March 17, 1986 pursuant to the Freedom of Information Act and the Privacy Act (FOIA/PA) that I became the subject of covert surveillance, covert operation(s) and investigations by the Federal Bureau of Investigation in approximately November of 1980.

10. Correspondence released to me pursuant to the FOIA/PA on or about March 17, 1986 between personnel of the FBI refers to my testimony regarding Chief Judge Harry E. Claiborne as background and justification for the FBI investigation and activities of which I was the target.

11. The information so far released to me pursuant to the FOIA/PA, consisting of 457 pages of 1239 which the FBI admits having generated or collected regarding me, confirms that FBI agents were assigned to monitor and intercept my legal and constitutionally protected activities as a result of my truthful and bona fide testimony favorable to Chief Judge Harry E. Claiborne.

12. The information so far released to me pursuant to the FOIA/PA on or about March 17, 1986, confirms that FBI agents intercepted and reported to their superiors concerning a conversation I had in my capacity as a member of the Finance Committee for Beecher Avants, a candidate for Sheriff who was opposed by former Sheriff John McCarthy. (McCarthy's candidacy was supported by former SAIC Joseph Yoblansky.)

13. The information so far released to me confirms that five FBI special agents were assigned to monitor and surveil a potluck Christmas dinner party which my wife who owns and operates a beauty shop, sponsored for her employees and favored customers on or about 12/13/80.

14. Logs of other surveillance activities and covert activities directed against me have been withheld and references to them have been obscured in materials so far released to me. I am presently seeking to obtain further information regarding such surveillance, covert operations and other investigations through the appeal process set forth for the FOIA/PA.

15. I have independent knowledge and evidence that on or about July 18, 1981, two individuals identified as law enforcement officers, obtained the floor plan of my home from an employee of a real estate broker, such officers and/or agents claiming the information was for a law enforcement purpose.

16. I have independent knowledge and evidence that on or about July 21, 1981, the air conditioning unit on my home was partially removed and tampered with in a manner characteristic of the installation of covert listening or bugging devices used to intercept and overhear conversations.

17. The Las Vegas Office of the FBI, pursuant to the direction of former SAIC Joseph Yablonsky, procured my demotion or "reassignment" from the Homicide Bureau to the front desk through malicious and unfounded false allegations to my superior, Sheriff John McCarthy stating that I would be indicted for violations of Federal law.

18. I will testify truthfully and fully concerning

those matters alleged in this Affidavit in any appropriate judicial proceeding.

Charles Lawrence Lee
CHARLES LAWRENCE LEE

SUBSCRIBED and SWORN to before me
this 28th day of April, 1986.

Adele L. Johansen
NOTARY PUBLIC

ADELE L. JOHANSEN
Notary Public, State of [illegible]
[illegible] in [illegible] County
My Appointment Expires April 25, [illegible]

AFFIDAVIT

STATE OF NEVADA)
COUNTY OF CLARK) ss.

MICHAEL VACLAV STUHFF, being first duly sworn,, deposes and states:

1. I am an attorney, licensed to practice in the States of Utah, Arizona and Nevada, in the Fifth, Ninth and Tenth Circuit Courts of Appeals and in the United States Supreme Court.

2. I am employed by and practice with Dominic P. Gentile, Ltd. in Las Vegas, Nevada.

3. In the course of my employment and practice, I represent Charles Lawrence Lee in regard to Freedom of Information and/or Privacy Act requests he has initiated with the Federal Bureau of Investigation and the United States Department of Justice.

4. Charles Lawrence Lee is presently employed by the Clark County District Attorney as a polygraph examiner and Assistant Chief Investigator.

5. Charles Lawrence Lee was formerly employed as a polygraph examiner and homicide detective by the Las Vegas Metropolitan Police Department.

6. While an officer of the Las Vegas Metropolitan Police Department, Charles Lawrence Lee administered a polygraph examination to Harry E. Claiborne and subsequently stated that, in his opinion, Harry E. Claiborne answered truthfully.

7. Charles Lawrence Lee was informed that former SAIC Joseph Yablonsky of the Federal Bureau of Investigation considered Lee "uncooperative" and that Yablonsky would lean on

Lee because of Lee's refusal to change his opinion.

8. Information so far obtained pursuant to the FOIA/PA requests of Lee and so far released to Lee on or about March 17, 1986 by the Federal Bureau of Investigation confirms that Lee was targeted by Yablonsky because of Lee's refusal to join in or cooperate with Yablonsky's vendetta against Judge Harry E. Claiborne.

9. On or about March 17, 1986, the F.B.I. released 457 pages of the 1239 which the F.B.I. admitted having collected on Lee.

10. The information so far released to us on or about March 17, 1986, confirms that as part of the modus operandi of the Las Vegas Office of the F.B.I. between on or about 11-19-80 through and until on or about 3-7-83 Lee was the subject of covert surveillance and covert operations by agents and/or informants of the F.B.I. and/or persons and agencies collaborating with the F.B.I.

11. The information so far released to us on or about 3-17-86 confirms that, pursuant to the modus operandi of the Las Vegas Office of the F.B.I. at the referenced time period, agents of the F.B.I. were assigned to conduct covert surveillance of Lee and to intercept and overhear his private conversations, among other assignments.

12. The information so far released to us on or about 3-17-86 confirms that agents of the F.B.I. did indeed maintain covert surveillance of Lee and did indeed intercept his private conversations and report to their superiors regarding the substance of such intercepted conversations.

13. The information so far released to us contains reports of one such intercepted conversation regarding Lee's activities as a member of the finance committee for Beecher Avants, a candidate for Sheriff of Clark County. (The Las Vegas Office of the F.B.I. was supporting incumbent Sheriff John McCarthy). On or about 12-12-80, five special agents of the F.B.I. participated in the interception of a conversation of Lee in which Lee explained to another person that he was not concerned as to his future with the Police Department when F.B.I. candidate John McCarthy finds out because it would be difficult to replace a polygraph operator.

14. The information so far released to us confirms that in pursuing his personal vendetta against Lee for refusing to cooperate in the fabrication of charges against Judge Harry E. Claiborne, former SAIC Yablonsky even assigned five special agents to monitor a potluck Christmas party dinner which Lee's wife, a beauty shop owner and operator, sponsored for her employees and favored customers on or about 12-13-80.

15. Former SAIC Yablonsky referred to Lee's polygraph examination and opinion of Judge Harry E. Claiborne in requesting the Director of the F.B.I. to make equipment available for use against Lee.

16. Charles Lawrence Lee has independent knowledge and evidence that on or about July 18, 1981, two agents obtained the floor plan of his home from a real estate salesperson, such agents claiming that the floor plan was needed for a law enforcement purpose.

17. Charles Lawrence Lee has independent knowledge and

evidence that on or about July 21, 1981, the air conditioning unit on the roof of his home was partially removed and tampered with in a manner characteristic of the installation of covert listening or bugging devices used to intercept and overhear conversations.

18. The Las Vegas Office of the F.B.I., pursuant to its modus operandi at the referenced time under the direction of former SAIC Yablonsky, procured the demotion of Charles Lawrence Lee through false allegations of wrongdoing.

19. I have discussed the contents of this Affidavit with Charles Lawrence Lee and he will be available and is willing to testify at any appropriate legal proceeding.

MICHAEL VACLAV STUHFF

SUBSCRIBED AND SWORN to before me
this 24th day of April, 1986.
Loretta J. Wentzel
NOTARY PUBLIC

LORETTA J. WENTZEL

AFFIDAVIT OF JERRY D. WATSON

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

JERRY D. WATSON, being first duly sworn, deposes and says:

1. That I reside at 757 Appletree Court, Henderson, Nevada.

2. That in 1981, I operated a tax consultant business with an associate, Linda Lamb.

3. That sometime in the early part of 1981, I had an occasion to consult with Chief United States District Court Judge Harry E. Claiborne with reference to the sale of his residence located at 500 Rancho Road, Las Vegas, Nevada. Primarily as a result of this conversation, I prepared his 1980 income tax return.

4. On March 8, 1983, I was served with a grand jury subpoena from a federal grand jury sitting in Portland, Oregon, which said grand jury I later determined was investigating Judge Claiborne.

5. Shortly after I was served with the grand jury subpoena, I was visited by Richard Jessinger of the FBI and Don Skelton who represented himself to be at that time an agent of the grand jury. This interview was cordial and had to do mainly with the circumstances under which I met the Judge, the number of tax returns done by my office, the number of returns I did personally, and the percentage of returns done by my staff, the fee charged the Judge, my personal experience and related questions. They interviewed my associate, Linda Lamb, my

employees, Peggy Katechi and Adele Ferrell.

6. The next day, Agents Jessinger and Skelton arrived at my office without an appointment and requested to see me immediately. I put aside my scheduled work and agreed to further interviews. Their attitude at this meeting was considerably changed from their cordial attitude of the day before. Questions were brittle, sharp and their comments sarcastic. I could best describe this interview by saying that Mr. Skelton went from smart remarks and scathing sarcasm to outraged hostility. For instance, at one time in the interview, he said, "How much was the bribe Judge Claiborne took from Joe Conforte? You can't answer that can you? Or can you?"

After a display of much hostility towards me, Mr. Skelton said, "Do you have a pen and paper?" which was rather obvious since I had a pad and several pencils in front of me. Skelton then said, "Write this down: 18 U.S.C. 1001 and 266 S.C. 7206." He then said, "Are you familiar with those code sections?" and I replied, "Not offhand." He then said, "Before you appear before the grand jury to give sworn testimony, you had better make sure you are familiar with both of them, and I do mean both of them."

During this meeting, I was asked for Judge Claiborne's records and I said, "I will not give Judge Claiborne's records to you." He then asked me why. I explained that I would only surrender the records to the grand jury in accordance with the subpoena. He then said, "We are officers and agents of the court and grand jury." and I replied, "I don't care who you are, I will only surrender the records to the grand jury." He then asked if I "comped" the judge for my work and I replied no. They then asked me how much I charged him and I answered by saying it was of no real concern of theirs.

7. On March 16, 1983, at 9 a.m., I arrived at the federal building in Portland, Oregon, and was approached by Agent Skelton who immediately separated me from the other witnesses and in the course of events I was moved to three different locations and each time joined by a different government agent. Skelton's reason for separating me from the other witnesses, he said, was to protect me from the newspaper reporters. It was clear that Skelton had been designated as the person to take personal charge of me, and he did.

I had brought with me whatever records that I had in my office which included Judge Claiborne's tax returns from 1975 through 1981, the income tax returns of his former wife, Norma Reis and some miscellaneous papers such as improvements on his residence, restaurant charges and charge receipts. Skelton asked me to deliver to him all the records that I had. I told him that I would but I wanted to make copies of whatever I was delivering and he took me to a copy machine room and I started to make copies of the records but he continually interrupted me and harassed me by sarcastic remarks and his hostility became so frightening to me that I just turned around and handed him all the records without finishing copying them.

8. Before I was called into the jury room, I was detained in a conference room with Agents Jessinger and Skelton

who started interrogating me. Out of curiosity and actual ignorance of the grand jury and investigative procedures, I said to them, "I cannot believe that charges such as the ones made against Judge Claiborne by a known criminal and a fugitive from justice could be accepted and acted upon even by making a deal with him to cut his income tax liability." At this remark, Jessinger's hostility appeared on the breaking point and he began to yell that the full force of both services (FBI and IRS) was thrown into these charges of misconduct and wrongdoing and it applied equally to Judge Claiborne as it did to anyone else. It was apparent from his facial expressions that he had a burning hatred towards Judge Claiborne. His remarks in answer to my question were interrupted by the entry into the room of Special Agent James Perry.

I was then escorted to the jury room and testified. By this time, I was a mental and physical wreck, brought about by the psychological harassment of these individuals since I had already had a myrocardial infarction (heart attack) and I was then under on-going treatment.

9. I was next subpoenaed for a grand jury appearance on June 8, 1983, in Reno, Nevada. Prior to my June 8th appearance before the grand jury, I was once again visited at my office by Agents Skelton and Jessinger. This visit was also unannounced and without an appointment. They just walked in while I was talking to a client and they said they wanted to talk to me immediately; so I excused the client. This meeting was a searching interrogation of all of the details of how Judge

Claiborne's return was prepared. They had already interviewed an assistant of mine, Charlotte Travaglia, who had done much of the work on Judge Claiborne's return. Their questions dealt with her involvement in the return as well as my involvement in the same; how we functioned together in the preparation of the return as well as all the details of the final preparation. This meeting followed the same pattern of the previous interviews: sarcasm and open hostility.

The next day, Agent Skelton came to my office alone. He advised me that if I was withholding any information that I had better not do it. He advised me to check my file and make sure I had not forgotten anything and to be very careful of what I said when I appeared before the grand jury in order to avoid perjury charges in the future. He asked me if I had a lawyer. He advised me that I could very well be indicted with Judge Claiborne on conspiracy charges and then he added, "Jerry, why stick your neck out for Judge Claiborne. Is it really worth it?"

10. I arrived in Reno on June 8th on the early morning flight. I had been sick all night and unable to sleep. If Mr. Skelton's remarks were designed to injure my health and to disturb the rest my condition required, he was successful.

11. While waiting to appear before the Reno grand jury on June 8, 1983, I was approached by Agent Skelton and taken to a private office. When we walked into the office, Agent Jessinger and two other men were there. One left and the other man stayed and he identified himself as Agent Halper. I am not sure of the correctness of this name. After identifying himself, this person

told me that he had been recently assigned to the case and he had reviewed the transcript of my testimony before the Portland grand jury and since there were so many contradictions and even outright falsehoods in my testimony, it was necessary for him to further interrogate me." This remark scared me to death and I said to him, "Am I under investigation or a target of this grand jury investigation?" He then said, "I am not aware of you being under investigation at this time." You will be advised should you become a target. I then said, "That isn't good enough. I do not feel that I should answer any questions at this time." Halper then jumped up from the table and angrily leaned over the table with his face contorted and his hands clenched. Agent Skelton quickly moved in and put his hand on my shoulder and said, "Jerry, we don't want to see you get into trouble. If you go out on a limb for Judge Claiborne, he is going to leave you hanging there and just walk away. You are too smart to take the fall for him. No one will be able to save you or help you." He then said we have talked to Mrs. Travaglia and you are going to be very surprised at what she has testified to.

When I was finally called before the grand jury, I was in such a mental state that until this date, the whole matter of my actual grand jury appearance seems like some vague dream. I couldn't remember certain facts about his tax return or the preparation of the same.

After I returned to Las Vegas, I remembered that I had testified that Judge Claiborne had not told me of collections that he had received in 1980 from his private practice before he had become a judge. I knew this was inaccurate and I called the Judge and told what I said and could not understand why I had said it because I knew that this item was on his summary of income furnished my office. When I reached him, he said, "Mr. Watson, you have just indicted me." I went to his office and we drove to his house where he kept his financial records and he produced the summary of income and expenses that he had furnished the office and his collections of $88,500 was entered on this document as item number 2. We returned to his office at the courthouse and he made me a copy of this sheet.

I asked him how I could correct my testimony and he suggested that I contact my attorney and let him advise me in that regard. This I did, and I telegraphed the grand jury foreman and Mr. Stephen Shaw. A copy of said telegram is attached hereto as Exhibit A. A copy of page 1 of the summary sheet furnished by Judge Claiborne to my office is attached hereto as Exhibit B to this affidavit.

On June 15, 1983, at about 5 p.m., FBI Agent Jessinger and the special agent that I believe was named Halper, came to my office. Halper stated, "I guess you think you are some kind of smart son-of-a-bitch and that you know how to cover your ass." and he yelled about the telegram being sent as part of a conspiracy between me and Judge Claiborne and demanded to see a copy of the telegram which I furnished him. All of these statements were made in unrestrained hostility and anger. After fifteen minutes of harassment, I finally said, "I will not discuss anything further with you people without my attorney present." Halper then said, "How come you were so god damned willing to talk so god damned freely in the past and you go around shooting your god damned mouth off to the press and now all of a sudden you don't want to talk without your attorney present?" I then replied I have asked to reappear before the grand jury and correct my testimony and I will do it with them and if I have anything to say, I will say it to the grand jury, not you. They left my office and as Halper went out the door he yelled, "I will be back. You can bet your ass I will be back." He said, "You're digging yourself a big hole and you are in big trouble."

12. After sending the wire to the foreman of the grand jury and Mr. Shaw, I was subpoenaed to appear before the Reno grand jury on July 6, 1983. This subpoena was issued to allow me to correct my testimony. However, on June 21, 1983, Mr. Stephen A. Shaw of the Justice Department canceled the subpoena by letter.

On July 23, 1983, I was served with a subpoena to appear before the federal grand jury in Reno, Nevada, on July 28, 1983 at 9:30 a.m. Prior to the subpoena, I had engaged Mr. Lawrence J. Semenza, an attorney of Reno, Nevada, to act as my counsel with reference to further grand jury proceedings. On July 28, 1983, at 9:30 a.m., I appeared with Mr. Semenza at the grand jury room located in the federal building, Reno, Nevada, to testify with reference to the telegram sent to Mr. Shaw and the foreman of the grand jury and other matters connected with my previous testimony.

My attorney, in my presence, requested a copy of my previous testimony since he felt by reason of the harassment of the agents before my appearance as well as my illness that I should have an opportunity to correct and clarify any confusing and incorrect testimony made under those circumstances. At that time, Mr. Shaw was accompanied by two criminal investigators of the IRS. When Mr. Semenza made his request for the transcript, Mr. Shaw, went along with the two criminal investigators and returned announcing that one transcript was 80 pages long and the other one 90 pages long. Mr. Shaw then stated to Mr. Semenza that he would furnish him the transcript for me to review if I agreed to testify at 1 p.m. and he attemped to get a guarantee from me and Mr. Semenza that I would indeed testify at 1 p.m. Both Mr. Semenza and myself explained to Mr. Shaw that we doubted we could review the transcripts in that period of time but that we would try. At that point, one of the IRS criminal investigators with Mr. Shaw said to Mr. Shaw in our presence and hearing, "You should inform Mr. Watson right now that he is a target of this federal grand jury investigation and you should inform Mr. Watson of what that fact means." Mr. Shaw then refused to give us the transcript and Mr. Semenza did not allow me to testify.

That evening (July 28), when I arrived at the McCarran International Airport in Las Vegas, Nevada, and approached the baggage turnstile to get my baggage, Agents Halper and ~~Jessinger~~ Skelton JW 4-30-' walked up and began to harass me. Agent Halper mainly did the talking. He demanded to know who was paying my attorney, Lawrence Semenza, and when I replied that I was still working out an arrangement with Mr. Semenza, Halper replied, "Bullshit. Harry Claiborne is paying Semenza and he is Claiborne's attorney. We have known for two weeks that Semenza was being sent in. If you are smart, you had better get you a lawyer that is representing you. You are digging a deeper hole and nobody is going to bail you out. You are a liar and we can prove it. Your attorney Semenza better make damn clear to you what is meant by a target of a grand jury investigation and the consequences of lying and covering up for Judge Claiborne." I then asked what they thought I was lying about and Halper responded, "You know damned well what we are talking about. You came up with a very clever explanation of the missing income and we believe the documents are a lie and we can prove it. You still have a chance to save your skin. Just come on down to the office and tell the truth and you are off the hook. Otherwise, you are in big trouble."

JERRY D. WATSON

SUBSCRIBED and sworn before me
this 30th day of april, 1986.

Peggy C Kotecki

PEGGY C. KOTECKI
Notary Public-State of Nevada
Clark County
My Appointment Expires Feb. 21, 1989

MIDDLETOWN, VA. 22645
14 M

Western Union Mailgram

4-0661905165002 06/14/83 ICS IPMMTZZ CSP LSVC
1 7024544772 MGM TDMT LAS VEGAS NV 06-14 0928P EST

JERRY D WATSON
757 APPLE TREE CT
HENDERSON NV 89015

THIS MAILGRAM IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

7024544772 TDMT LAS VEGAS NV 91 06-14 0928P EST
PMS STEVEN SHAW RPT DLY MGM, DLVR ASAP AM, DLR
JUSTICE DEPT CARE US ATTORNEY
300 SOUTH BOOTH ST
RENO NV

SIR
AFTER REVIEWING MEMOS NOT IN MY POSSESSION PRIOR TO MY TESTIMONY BEFORE THE GRAND JURY JUNE 8 1983 RENO NEVADA I FIND THAT HARRY E CLAIBORNE DID REPORT TO MY FIRM $88,500.00 COLLECTION OF ACCOUNTS RECEIVAPLE IN 1980. THIS WAS UNCOLLECTED ACCOUNTS RECEIVABLE FROM HIS LAW PRACTICE AT THE TIME THE PRACTICE WAS CLOSED. THE $88,500.00 IS REFLECTED ON SCHEDULE D OF 1980 1040 PART 2 LINE 8 COLUMN B IN THE FIGURE OF $150,000.00. I WOULD LIKE THIS FACT KNOWN TO THE GRAND JURY AS PART OF MY TESTIMONY.

JERRY D WATSON
757 APPLE TREE CT
HENDERSON NV 89015

****

SPECIAL 30-DAY OFFER

GET $1.00 OFF ON YOUR NEXT MAILGRAM ORDER

TO SEND YOUR MAILGRAM(S), CALL 800-257-2241 AND ASK FOR OPERATOR 35.
WE'LL AUTOMATICALLY DEDUCT $1.00 FROM YOUR TOTAL BILL. OFFER GOOD ON EACH ORDER PLACED DURING THE NEXT 30 DAYS.

****

1180

Income

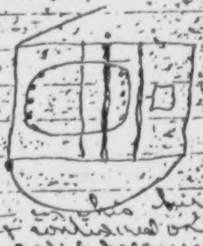
① Wages As Federal Judge $54,499.92

② Income from Private Practice Before Appointment in 1978 Payable And Received in 1980 $ 88,500.00

③ Interest On Savings Account At Nevada Savings $ 1,773.14

④ interest earned on Dividends New York Life Insurance Policy $ 632.62

also - t 4 345



⑤ What I see in this business transaction is fair mkt value was not considered on the book sale — he had a gain from sale because book value was used as basis. If he had knowledge of there fair market value we can go for it. 80 returns, supply to Part No 3 Income +

⑥ What about Pioneer S & L ? if monies withdrawn he should have a forfeiture

AFFIDAVIT OF CHARLOTTE TRAVAGLIA

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

CHARLOTTE TRAVAGLIA, being first duly sworn, deposes and says:

1. That I reside at 3679 McKinley Avenue, Las Vegas, Nevada.

2. That in the year 1981, I was employed by Jerry D. Watson as an accountant. During the course of my employment, I had occasion to do some of the work on the preparation of the 1980 1040 tax return of Judge Harry E. Claiborne. In the course of these duties, I had occasion to review and consider documents submitted by Judge Claiborne to Mr. Watson. One series of documents furnished by Judge Claiborne was six or seven pages on yellow legal paper, stapled together, which was a summary of Judge Claiborne's income, interest on savings accounts, dividends, sale of property, and improvements on said property. Page one of that document is attached hereto as Exhibit A to this Affidavit. The notations numbered paragraphs 5 and 6 are in my handwriting as well as other notations appearing thereon including asterisks appearing on paragraphs 2 and 5.

3. On July 8, 1983, I appeared before the federal grand jury sitting in Reno, Nevada, and testified as to my relationship with Jerry D. Watson and all of the particulars that I could remember pertaining to the preparation of Judge Harry E. Claiborne's 1980 tax return. On or about the 10th or 11th of July, I was contacted by agents of the FBI and asked to come to

their offices in the federal building for further interview with reference to Judge Claiborne's 1980 tax return.

When I arrived at the offices of the FBI in the federal building, I was accompanied to a conference room and interviewed. Present at this interview were Special Agents Perry and Jessinger of the FBI and Special Agent Skelton of the IRS and three or four other individuals unknown to me. Mr. Perry handed me a copy of Exhibit A attached to this Affidavit and asked me if I had ever seen it before and I replied, "Yes, that is one of the documents furnished by Judge Claiborne to Jerry Watson which we reviewed in preparation of his tax return." I stated to them that my handwriting appeared on paragraphs 5 and 6 and that the asterisks appearing on paragraphs 2 and 5 were placed thereon by me and I pointed out to them other notations appearing on this document in my handwriting. In other words, I confirmed to them that this document was one of the documents submitted by Judge Claiborne to our office and reviewed by us in the preparation of his 1980 tax return.

Charlotte Travaglia
CHARLOTTE TRAVAGLIA

SUBSCRIBED and sworn before me
this 1st day of May, 1986.
Jake W Headley

1980

Income

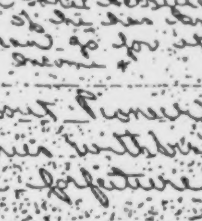
① Wages As Federal Judge $54,499.92

② Income from Private Practice
Before Appointment in * 88,500.00
1978 Payable And Received
in 1980

③ Interest On Savings Account
At Nevada Savings $1,773.14

Interest earned on
④ Dividends ~~on~~ New York Life
Insurance Policy $632.62

also - t $ 345



⑤. What I see on his business transaction is fair mkt
value was not considered on the book sale — the tax
a gain from sale because book value was used
as basis. If he has knowledge of the fair market
value we can go for it. 80 return, & apply to
that No 3 income

⑥ What about Pioneer S&L ?
if monies withdrawn he should
have a forfeiture

AFFIDAVIT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

EDDIE LARUE, being first duly sworn, deposes and says:

I have been a private detective in Las Vegas, Nevada, for 25 years, duly licensed by the State of Nevada. During that period of time, I have worked for Harry E. Claiborne, who was then a prominent lawyer, as an investigator in countless cases.

In 1980, I became a target of the FBI office in Las Vegas, Nevada, along with Judge Claiborne. The FBI tried to involve me in the illegal bugging of a couple's house located in Las Vegas. They claimed I bugged the house at the insistance of Judge Claiborne in 1977. This was wholly untrue and false and there never was any evidence offered to prove such a charge, but, the future events almost ruined my life, almost destroyed my family and business and nearly bankrupted me.

To my utter astonishment, a federal grand jury was empaneled to investigate me and Judge Claiborne. All of my employees, present and past, were summoned before this panel to testify. All of my associates and those with whom I had a social or working arrangement were called to testify before this panel. No indictment was ever returned against me or Judge Claiborne for the original charges. Rightfully so, since I never had bugged anybody or anyplace for Judge Claiborne nor had he ever asked me to do a single unlawful or unethical act in the 20 years that I worked on his cases.

Later, however, I was indicted on six counts relating to the alleged installation of illegal listening devices.

Before my trial an FBI agent came to see me. He advised me to "give up" Judge Claiborne. This law enforcement slang means to give evidence of the guilt of some other person. The agent advised me that if I would do that, all federal charges (the indictment against me) would be dropped. I told him to "give up" Judge Claiborne would be false since I didn't know a single thing illegal or unlawful that Judge Claiborne had ever done. The message was clear to me I could rid myself of all the expense, embarrassment, intimidation and sorrow that I had suffered and was about to suffer simply by lying against Judge Claiborne. This I pointedly refused to do and went to trial.

I went through the anguish of defending myself against these false charges in Reno Federal Court. The Government removed the trial to Reno, Nevada, 500 miles from my home, which added additional financial burden in travel expenses for myself, my attorney and witnesses. After a week-long trial I was acquitted.

This trial cost me $35,000 in attorney fees alone, to say nothing of the expense of taking my witnesses all across the State to the trial.

I was wrongfully indicted for the sole purpose of giving the FBI leverage to make a deal with me. The sole purpose and object of my indictment was to "get" Judge Claiborne. He was their target, not me.

Eddie La Rue
EDDIE LARUE

SUBSCRIBED and SWORN to before me
this 2nd day of May, 1986.

Ilene Martin
NOTARY PUBLIC

ILENE MARTIN
Notary Public State of Nevada
CLARK COUNTY
My Appointment Expires Mar. 20, 1989

AO 110 (Rev. 10/82)

SUBPOENA TO TESTIFY BEFORE GRAND JURY

United States District Court	DISTRICT Nevada
TO: Harry E. Claiborne 1908 Plaza De La Cruz Las Vegas, Nevada	SUBPOENA FOR ☒ Person ☒ Document or Object(s)

YOU ARE HEREBY COMMANDED to appear in the United States District Court at the location, date, and time specified below to testify before the Grand Jury in the above entitled case.

PLACE Federal Building & U.S. Courthouse 300 Booth St. Reno, Nevada 89509	COURTROOM Fourth Floor Grand Jury Room
	DATE AND TIME July 20, 1983 9:30 A.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):[1]

1. All documents relating to Joseph and/or Sally Conforte created between January 1, 1977 and the date of this subpoena; said documents to include, but not be limited to records of payments, receipts, billings, accounts receivable notes, memoranda and correspondence.

2. All records relating to real estate and/or interests in real estate acquired and/or sold by you at any time during 1978; said records to include, but not be limited to deeds, trust deeds, escrow statements, cancelled checks and other payment records, cash receipts journals and other records of monies received from the sale of real estate or investments in real estate.

3. All documents reflecting fees received by you from clients (either directly or through attorneys with whom you shared fees) at any time since September 1, 1978; said records to include but not be limited to cash receipts journals, copies of

☒ Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK CAROL C. FITZGERALD, CLERK	DATE July 7, 1983
(BY) DEPUTY CLERK Faye McMillan	
This subpoena is issued on application of the United States of America by:	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY STEVEN A. SHAW, Esq. Public Integrity Section U.S. Department of Justice Washington, D.C. 20530 (202) 724-7062

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(1) If not applicable, enter "none."

RETURN OF SERVICE[2]

RECEIVED BY SERVER	DATE July 7, 1983	PLACE Las Vegas Nevada
SERVED	DATE July 7, 1983	PLACE 1505 Vegas [illegible] [illegible] Las Vegas, NV.

SERVED ON (NAME)
Harry E. Claiborne

SERVED BY Leo B. Hagen	TITLE Special Agent IRS

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER[3]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on 7-7-83
Date

Leo B. Hagen
Signature of Server

Las Vegas, Nevada
Address of Server

ADDITIONAL INFORMATION
receipts, diaries, bank deposit records and notes.

4. All documents relating to agreements between you and other attorneys relating to the sharing of fees from cases that were referred by you upon taking the bench.

5. All documents relating to the preparation and/or filing of your federal income tax returns for the tax years 1978 through 1982 including, but not limited to copies of the returns, copies of amended returns, workpapers, summaries, invoices, cancelled checks, bank statements, business records, notes, memoranda and correspondence.

6. All documents relating to the preparation and/or filing of your financial disclosure reports filed pursuant to the Ethics in Government Act and all supplements thereto from September 1, 1978 to the date of this subpoena; said documents to include, but not be limited to summaries, workpapers, financial statements, invoices, asset records, liability records, bank statements, cancelled checks, notes, memoranda and correspondence.

7. All documents relating to loans received by you at any time from January 1, 1978 through the date of this subpoena; said records to include, but not be limited to bank statements, deposit records, notes payable, (continued - See Attachment)

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[2] As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

[3] "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure)"

payment records, cancelled checks, memoranda and correspondence.

8. The original of a one yellow page, lined document, legal size, with the heading "1980", and with the numbers: "One through six" listed vertically along the left margin; said document containing on the reverse side, among other things, the following, or similar notation: "JGP 6/16/83, Sol Sayeh".

9. All telephone toll records for personal and business telephones and telephone credit cards listed to you, for calls made by you during the period September 1, 1978 to December 31, 1981.

10. All records of monies expended by you during official travel taken to Portland, Oregon during 1979; said records to include, but not be limited to airline receipts, and records relating to hotel, telephone and meal expenses.

11. All records of monies expended by you during official travel taken to the State of California at any time between May 25, 1979 and June 15, 1979; said records to include, but not be limited to airline receipts and records relating to hotel, telephone and meal expenses.

12. Personal diaries kept by you at any time between September 1, 1978 and the date of this subpoena.

13. All records of telephone messages reflecting calls received by your law office and/or chambers from Joseph Conforte and/or Stanley Brown between January 1, 1977 and the date of this subpoena.

14. All documents relating to the sale, attempted sale and disposition of your law practice, office furniture, books, files, accounts receivable and/or other equipment at any time between January 1, 1977 and the date of this subpoena.

15. All documents identifying your law practice's accounts receivable as of September 1, 1978; said documents to include, but not be limited to documents identifying the client and the amount owed by each such client.

1980

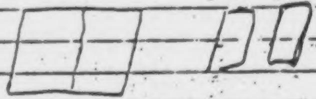
Income

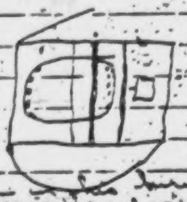
① Wages As Federal Judge $54,499.72

② Income from Private Practice Before Appointment in 1978 Payable And Received In 1980 $88,500.00

③ Interest On Savings Account At Nevada Savings $1,773.14

④ Interest earned on Dividends ~~on~~ New York Life Insurance Policy $632.62





⑤ What I mean is this business transaction is: fair mkt value was not indicated on the [illegible] — the [illegible] gain from sale because book value was used [illegible] to the best knowledge of [illegible] fair market value we can go for it. No [illegible], supply to that no 3 income.

⑥ What about Pioneer S&L ? if monies withdrawn he should have a forfeiture.

CBH 6/6/93

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR-R-83-57-WEH
	)	
HARRY EUGENE CLAIBORNE	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE AND FOR EVIDENTIARY HEARING AND DISCOVERY

The United States of America, by its undersigned counsel, respectfully submits this Opposition to the Defendant's Motion to Vacate Sentence and his request for discovery and an evidentiary hearing.

I. INTRODUCTION

Defendant was sentenced on October 3, 1984 to a two-year prison sentence by this court. Now, after a year and a half of proceedings in the Court of Appeals and the Supreme Court, the Defendant has exhausted his appellate remedies and is faced with a prison reporting date of May 15, 1986. In an eleventh-hour effort to avoid commencement of his prison sentence, however, he has filed several voluminous pleadings in this court and the Court of Appeals, without any apparent regard for jurisdictional rules, legal precedent, or factual accuracy.

This last ditch attempt by Defendant to buy some time by filing frivolous motions must be rejected.

Defendant raises three arguments in his motion which he claims warrant relief. The first pertains to an alleged burglary of his home in 1981 sponsored by FBI agents. The second pertains to alleged grand jury abuse involving witness Jerry Watson. The third is a legal argument, that defendant's sentence is illegal because he was designated to an institution outside the District of Nevada. Before addressing each of these arguments in turn, we first summarize the legal standards which the court may apply.

II. LEGAL STANDARDS

It is unclear exactly what sort of motion the Defendant has filed. He styles it as a motion under 28 U.S.C. §2255; yet clearly it cannot be a 2255 motion since he is not in custody at this time and relief under that statute is available only to "a prisoner in custody under sentence of a court established by an Act of Congress." 28 U.S.C. §2255; Parker v. Ellis, 362 U.S. 574 (1960); Baker v. United States, 429 F.2d 278, 1279 n.1 (9th Cir. 1970). Nor can this be a motion for new trial under Rule 29(c), as there is a seven-day time limit for such a motion. Nor can it be a motion for new trial under Rule 33 based on government misconduct or "the interest of justice," as there is a seven-day time limit for that motion as well.

Thus it would appear that, as to grounds one and two (the burglary and Watson) this is a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure based on newly discovered evidence, and as to ground three (the prison location) it is a motion to correct an illegal sentence.

A defendant who moves for a new trial based on newly discovered evidence must meet these five requirements:

> (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered, i.e., discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal.

United States v. Diggs, 649 F.2d 731, 739 (9th Cir. 1981), cert. denied, 454 U.S. 970 (1982); United States v. Krasny, 607 F.2d 840 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980). The decision whether to proceed by affidavit or to hold an evidentiary hearing on a motion for new trial is within the sound discretion of the trial judge. United States v. Alexander, 695 F.2d 398, 402 (9th Cir. 1982); United States v. Scott, 521 F.2d 1188, 1195 (9th Cir. 1975). Ordinarily, the court may determine the motion on affidavits without a hearing. See, e.g., United States v. Hedman, 655 F.2d 813, 818 (7th Cir. 1981); United States v. Metz, 652 F.2d 478, 481 (5th Cir. 1981). Even when government misconduct has been alleged in a motion for new trial, the court may in its discretion decide the motion without a hearing. United States v. Nace, 561 F.2d 763, 772 (9th Cir. 1977). 1/

III. ANALYSIS

A. The Burglary Allegation

In his motion, Defendant alleges that in 1971, FBI agent Stephen Rybar, Las Vegas Metro Police Sergeant Dennis Caputo, informant Clifford Isbell and his friend James Johnson all broke into Defendant's home at 1908 Plaza De La Cruz in Las Vegas in order to gain access to Defendant's personal financial records. The motion goes on to allege that Rybar took photographs of Defendant Claiborne's personal financial diary information, which provided the basis for the investigation and prosecution of the Defendant. As proof of this allegation, the Defendant submits the affidavits of James Johnson, one of the alleged burglars, and Lake Headley, an investigator who has interviewed Clifford Isbell, another of the alleged burglars. Defendant also points to a subpoena served on the Defendant on July 7, 1983, which in item 12 requested production of all personal diaries kept by the Defendant while on the bench. Finally, Defendant submits the

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1/ Alternatively, were this motion to be construed as a habeas corpus petition under 28 U.S.C. §2255, Defendant's motion would have to show the existence of "a fundamental defect which inherently results in a complete miscarriage of justice" and would have to "present exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Davis v. United States, 417 U.S. 333, 346 (1974); Hill v. United States, 368 U.S. 424, 429 (1962). No hearing is required if the files and records of the case conclusively show that the petitioner is entitled to no relief. Rule 4(b) fol. §2255 (1982); see, e.g., United States v. Samuelson, 722 F.2d 425, 427 (8th Cir. 1983).

affidavits of Chuck Lee, Eddie LaRue, Jerry Watson, Charlotte Travaglia, and Michael Stuhff, alleging general "evil aminus" and "further outrageous and unconsciousable acts."

As a factual matter, Defendant's allegations are wholly without merit. The alleged break-in did not, to the knowledge of the Government, ever occur. Moreover, three of the alleged participants in the break-in, Agent Rybar, Sergeant Caputo, and Clifford Isbell, have denied participating in such an alleged break-in. (See attached affidavits of Agent Rybar, Sergeant Caputo, and IRS Agents Green and Bethke, who interviewed Isbell, Attachments A, B, C and D.) Defendant's affidavit of Johnson, a convicted felon, 2/ claiming that the burglary occurred, is directly contradicted by the affidavits of Agent Rybar and Sergeant Caputo attached hereto, who state categorically that such an event did not occur. The affidavit of Headly submitted by Defendant concerning Isbell's alleged statements to him is directly contradicted by the affidavits of IRS agents Green and Bethke attached hereto. Green's and Bethke's affidavits explain that Isbell told them that Headly had asked Isbell to say he had broken into the Defendant's house, and Isbell refused to comply with Headly's request to say such a thing because it was not true. (This matter also has been the subject of a state investigation, which has been concluded. See Attachment L.)

2/ Johnson is presently serving a four-year sentence for unlawful use of a cheating device at gambling.

Also attached are the affidavits of retired FBI agent Joseph Yablonsky, and has Las Vegas Police officer Kent Clifford, who deny having counselled or had knowledge of this alleged burglary. Attachments E and F.

Also attached is the affidavit of Steven Shaw, which refutes the contention made by Rybar that Shaw knew about the burglary, and further explains that the reason Claiborne's personal diaries were subpoenaed is that it was Shaw's routine practice in drafting subpoenas to include a request for personal diaries. Attachment G.

Finally, attached are the affidavits of FBI agent Richard Jessinger and IRS agents Donald Skelton and Leo Halpern, to deny the general allegations of "outrageous conduct" made by Jerry Watson and Charlotte Travaglia. Attachments H, I, and J.

The Chuck Lee and Eddie La Rue matters were, as Defendant concedes at page 7 of his motion, the subject of pre-trial motions. This is not "new evidence" and need not even be addressed here.

Not only do the Defendant's allegations with respect to the alleged burglary fail completely as a matter of fact, they also fail to establish a legal basis for relief. Defendant has made no showing as to why with due diligence the allegations he makes today could not have been discovered and made before, and he makes no showing that the information he sets forth about this alleged burglary was "material" to the issues raised at trial.

For these reason, the Defendant's motion should be denied as to this ground.

B. The Watson Allegation

Defendant's second contention concerns the Government's alleged abuse of the grand jury proceedings that resulted in the indictment of Defendant. This purported abuse relates to the alleged failure of the Government to present exculpatory evidence to the grand jury and the alleged intimidation of a grand jury witness by Government agents. As explained below, these allegations are wholly inadequate to support an attack on Defendant's conviction for several distinct reasons. Factually, the allegations are refuted by the record and the attached affidavits. Moreover, when analyzed under controlling authority, Defendant's contention does not provide a legal basis for attacking his conviction even if his factual allegations were to be credited fully. Rather, Defendant's allegations are simply a rehash of matters explored fully and rejected at Defendant's trials and Defendant has not raised any issue that warrants the extraordinary post-conviction, post-appeal relief he now seeks. Put simply, Defendant's second contention is wrong on the facts and wrong on the law.

1. Defendant's Allegedly "Exculpatory" Evidence was Made Available to the Grand Jury

The facts alleged by Defendant in support of his second contention principally relate to the circumstances surrounding the appearance of Defendant's accountant, Jerry Watson, before the grand jury that indicted Defendant. Defendant claims that when Watson appeared before the Reno grand jury on June 8, 1983, Watson was "in such a mental state" that "the whole matter of [his] actual grand jury appearance [seemed] like some vague dream." Watson Affidavit, ¶11. Defendant claims that after Watson returned to Las Vegas, Watson recovered sufficiently from his dream-like state to remember that he had testified inaccurately concerning one issue. Specifically, Watson allegedly remembered that the Defendant has provided Watson with a written report of his $88,500 income in 1980 from his private law practice. When reported by Defendant to Watson, this figure allegedly was recorded on a yellow sheet of legal paper, which was introduced at Defendant's trial as defense exhibit 41. Watson claims that he had forgotten to mention that the Defendant had reported this income to Watson when Watson testified before the grand jury in June 1983.

The misconduct alleged by Defendant is that the Government improperly frustrated an attempt by Watson to reappear before the grand jury so that he could correct his prior testimony. A review of the record demonstrates that this contention was fully litigated during the course of pre-trial proceedings and Defendant's two trials. At that time the contention was properly dismissed as being devoid of merit for two distinct reasons, discussed below. First, the failure of Watson to reappear before the grand jury must be attributed to a conscious decision made by Watson and his attorney, Lawrence Semenza. Responsibility for Watson's failure to reappear cannot properly be assigned to the Government. Second, the substance of the "exculpatory" information that Watson sought to communicate to the grand jury was made known to the grand jury in two separate written communications submitted by Watson. As such, there is simply no plausible merit to Defendant's claim that the grand jury's charging decision was reached on the basis of inaccurate information caused by Watson's failure to reappear.

Watson testified during the first trial of this case that, at the time of his June 1983 grand jury testimony, he had not reviewed the yellow sheet introduced as defense exhibit 41. TR 2802. As a result, Watson did not then recall having been provided 1980 legal fee income by Defendant. TR 2803. According to his trial testimony, Watson recalled that this information had been provided by Defendant only after Watson's recollection was refreshed during a subsequent meeting with the Defendant. TR 2803-06.

Watson further testified that he then caused two Western Union mailgrams to be transmitted in an attempt to supplement his grand jury testimony. One mailgram was sent to the prosecutor assisting the grand jury investigation, Steven Shaw, and one was sent to the foreman of the Reno grand jury. TR 2792. The mailgrams, which were dated June 14, 1983, read as follows:

> Sir, after reviewing memos not in my possession prior to my testimony before the Grand Jury June 8, 1982, Reno, Nevada, I find that Harry E. Claiborne did report to my firm $88,500 collection of accounts receivable in 1980. This was uncollected accounts receivable from his law practice, at the time the practice was closed. The $88,500 is reflected

> on Schedule D of 1980 1040, Part 2, Line 8, Column B, in the figure of $150,000. I would like this fact known to the Grand Jury as part of my testimony.

The mailgram addressed to the foreman was delivered to him, TR 2792, and thereafter presented to the grand jury, TR 2793. Thus, without further discussion, it is clear that the record refutes Defendant's contention that the grand jury heard only Watson's uncorrected testimony.

Defendant's claim is further eroded by Watson's continued testimony at the first trial. Watson testified that, after sending the mailgrams, he consulted with an attorney, Lawrence J. Semenza. TR 2808. Semenza also testified at length concerning his representation of Watson. According to Semenza, he was retained by Watson on July 25, 1983 to represent him during his reappearance before the grand jury, then scheduled for July 28, 1983. TR 2899. Between July 25 and July 28, Semenza initiated no contact with Government counsel and he made no effort to contact the District Court Judge supervising the Reno grand jury. In particular, Semenza made no request to review transcripts of Watson's prior grand jury appearances. TR 2912.

Instead, Semenza and Watson appeared in the grand jury witness room on July 28 and waited until about 11:15 a.m. This wait was occasioned by the fact that other witnesses were appearing before the grand jury. At about 11:15 a.m., the grand jury was prepared to hear Mr. Watson. At that time Semenza met Government counsel and served him with a motion to quash the

Watson subpoena. TR 2902-03. To address Semenza's concerns, Government counsel agreed to provide two grand jury transcripts for Watson to review on condition that the review would be finished by 1:00 p.m. TR 2904. Semenza declined to be bound by such an agreement. TR 2905. Government counsel offered to extend the review period until 1:30 p.m. Semenza again declined to be bound by such an agreement. TR 2905. Government counsel explained that there were no other grand jury witnesses scheduled that day and that he did not think it fair to ask the grand jury to wait for more than two hours with no agreement that Watson would ever agree to testify. TR 2915. Semenza declined to enter into any agreement regarding the fact of Watson's testimony, TR 2905, and at that time Watson's scheduled reappearance before the grand jury was cancelled. On these facts -- as admitted by Watson's own counsel -- the Government can hardly be assigned responsibility for Watson's failure to reappear before the grand jury.

Moreover, in December of 1983, Watson again took action to communicate with the Reno grand jury without actually being required to appear. After discussion with Semenza, Watson executed an affidavit to the effect that Judge Claiborne had in fact reported to Watson $88,500 in legal fee income for 1980. Defense Exhibit 43; TR 2929. This affidavit was sent by Watson to Semenza. TR 2907. Semenza attached the affidavit to a cover letter dated December 7, 1983 addressed to the foreman of the grand jury. TR 2907. Semenza then took the letter and affidavit to the Federal Building in Reno where the grand jury was sitting. TR 2908. At about 9:00 or 9:15 a.m., he delivered the document to the grand jury, placing it on the foreman's desk. TR 2909. The grand jury minutes reflect that time affidavit was conveyed to the grand jury. TR 2911.

Based on the foregoing, it is evident that there is simply no factual basis for Defendant's claim that the Government abused the grand jury process by preventing a reappearance by Watson before the grand jury and thereby causing the return of an indictment by the grand jury without the benefit of Watson's additional exculpatory testimony. The Government did not prevent his reappearance -- Watson and Semenza did. And the grand jury was not deprived of Watson's "exculpatory" information -- it twice was presented to the grand jury by Watson's written submissions.

In an attempt to bolster his obviously unfounded claims of grand jury abuse, Defendant's motion also raises two other factual matters as purported evidence of the Government's eagerness to abuse the grand jury process. First, Defendant alleges that Government agents harassed and intimidated Watson during the period of the grand jury investigation. Second, Defendant alleges that the Government purposefully shielded the grand jury from relevant evidence possessed by Charlotte Travaglia, Watson's assistant. Each of these allegations can be dismissed quickly.

As to the first matter, the alleged harassment and intimidation of Watson by Government agents, the Government categorically denies the allegations of misconduct contained in Watson's affidavit. The Government will not burden this Court with an extended discussion of each allegation in this pleading. Rather, the Court is respectfully referred to the attached affidavits of FBI Special Agent Richard Jessinger and IRS Special Agents Donald Skelton and Leo Halpern (Attachments H, I and J), in which Watson's myriad of factual allegations are addressed and refuted. (Notably, Watson failed to mention this alleged intimidation during his extensive testimony at Defendant's trials.)

The apparent gist of Defendant's allegation concerning Charlotte Travaglia is that the Government had an obligation to ask her to reappear before the grand jury to testify concerning her knowledge of defense exhibit 41. Appended to Defendant's motion is an affidavit of Travaglia, which correctly states that she was not asked about this exhibit during her initial grand jury appearance. Travaglia Affidavit, ¶3. 3/ Obviously, Travaglia could not have been asked about the document at that time because it was not presented to the Government (by an intermediary of the Defendant) until after Travaglia's grand jury appearance, when it was first delivered to the Government on June 16, 1983. January 10, 1984 Transcript at 396. The

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3/ The affidavit incorrectly states that Travaglia testified before the Reno grand jury on July 8, 1983. The record reflects that this appearance was on June 8, 1983.

Travaglia affidavit also correctly states that Travaglia was thereafter interviewed by Government agents concerning this document. Id. From these facts, the Defendant argues that the Government abused the grand jury by not having Travaglia reappear to testify concerning defense exhibit 41.

The fatal flaw in Defendant's argument is that he incorrectly assumes that Travaglia's reappearance would have exculpated the Defendant. Notably, the Travaglia affidavit submitted with Defendant's motion does not state that Travaglia told the Government agents in her post-grand jury interview that the $88,500 legal fee income was reported on defense exhibit 41 when she received it. In fact, when Travaglia was interviewed by Government agents on June 17, 1983, she stated that the $88,500 figure on the form (item two on the form), unlike most of the form, did not appear to be in her handwriting. Rather, she believed that the $88,500 figures appeared to have been written by Watson. Moreover, Travaglia was unable to explain why the $88,500 was not reported as income on Defendant's return if the figure had been on defense exhibit 41 when she was preparing Defendant's return. Travaglia flatly stated that she was never told to include the $88,500 as income. See Attachment K. As such, the Government agents' post-grand jury interview of Travaglia did not exculpate the Defendant, but simply provided further evidence of the Defendant's guilt of the crime charged in Count VII. The facts do not support Defendant's contention that Travaglia should have been asked to reappear to present exculpatory evidence -- and Defendant can hardly contend that the Government committed error by failing to present additional evidence of his guilt to the grand jury.

2. Defendant Has Failed to Establish Any Basis in Law For the Relief He Seeks

As explained above, Defendant's allegations of grand jury abuse must fail because his underlying factual contentions are refuted by the record and by the other factual material submitted by the Government in response to this motion. Even assuming *arguendo* that Defendant could substantiate his allegations, Defendant's attack on his conviction must fail as a matter of law for three independent reasons. First, under recent Supreme Court authority, Defendant is not entitled to raise grand jury abuse in post-conviction proceedings. Second, Defendant's contentions do not suggest any conduct that constitutes improper "abuse" of the grand jury. Third, all of the issues raised by Defendant were known to him at his trial and could have been raised in his appeal and, as such, they cannot provide a basis for a post-conviction, post-appeal attack on the proceedings.

Turning to the first legal obstacle to Defendant's motion, the gist of Defendant's attack on the grand jury proceedings is that the Government allegedly deceived the grand jury by refusing to allow Watson to give testimony that would have exculpated the defendant on one of the false tax return charges. Presumably the Defendant believes that the grand jury would not have chosen to indict if Watson had been allowed to reappear before the grand jury and present live testimony.

Ignoring for the moment that the substance of Watson's "exculpatory" testimony was presented to the grand jury, in a very recent decision the United States Supreme Court held that attacks such as Defendant Claiborne's on the grand jury's charging decision may not be raised by criminal defendants after they have been convicted by a petit jury at trial. In United States v. Mechanik, ____U.S.____, 106 S.Ct. 938 (1986), the Supreme Court held that a verdict of guilty by the trial jury renders "any error in the grand jury proceeding connected with the charging decision . . . harmless beyond a reasonable doubt." 106 S.Ct. at 942 (footnote omitted). In addressing a violation of Rule 6(d), Fed.R.Crim.P., the Court wrote:

> The rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

106 S.Ct. at 941-42 (footnote omitted).

In the trial of the charges against Defendant Claiborne, the petit jury had available to it the full and unrestricted testimony of Watson -- including any "exculpatory" testimony that Defendant wished to elicit. In light of the petit jury's verdict when it applied a reasonable doubt standard to the Government's evidence, it is frivolous to suggest that further grand jury testimony by Watson would have affected the grand jury's charging decision. In Mechanik, the Supreme Court held that this Court need not entertain such frivolous arguments.

Second, even if this issue was being raised properly in a pre-conviction proceeding, Defendant's allegations concerning Watson's failure to reappear before the grand jury do not establish an instance of abuse of the grand jury process by the Government. At the outset, the remedy sought by Defendant -- dismissal of the indictment because of grand jury abuse -- is "rarely invoked" and available only in "flagrant cases of prosecutorial misconduct." United States v. Sears Roebuck & Co., 719 F.2d 1386, 1390-91 (9th Cir. 1983). This remedy is not available when, as here, the Defendant simply alleges that the Government has abused the grand jury by failing to present exculpatory evidence.

> It is well settled that the prosecutor is "not required to present the grand jury with evidence which would tend to negate guilt." United States v. Lasky, 600 F.2d 765, 768 (9th Cir.), cert. denied, 444 U.S. 979, 100 S.Ct. 480, 62 L.Ed.2d 405 (1979). The grand jury does not weigh the guilt or innocence of the accused but acts only to make a preliminary determination whether there is probable

> cause to believe him guilty of a crime. United States v. Cederquist, 641 F.2d 1347, 1352 (9th Cir. 1981).

Id. at 1394 (footnote omitted). See also United States v. McClintock, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984); United States v. Romero, 585 F.2d 391, 399 (9th Cir. 1978) (Government had no obligation to present grand jury with letter prepared by defendant's counsel that contained exculpatory evidence). As demonstrated in the preceding factual discussion, in this case the Government went far beyond its obligations by allowing the grand jury to consider Watson's allegedly exculpatory mailgram and the letter prepared by Watson's attorney, Lawrence Semenza. Even if this important fact is ignored (as Defendant would have it), any failure to allow a reappearance by Watson simply is not a cognizeable basis for attacking the indictment.

Finally, Defendant's attack on the grand jury proceedings must be rejected because it is based on evidence that was available to Defendant prior to his conviction and appeal, and thus cannot be raised by Defendant in this extraordinary post-appeal attack on his conviction. The foregoing factual discussion demonstrates that the circumstances surrounding Watson's attempt to reappear before the grand jury were fully explored at Defendant's first trial and thus any attack on the grand jury proceedings could have been made by Defendant at that time. Watson's allegations about purported intimidation by Government agents also could have been raised by Defendant then.

The only supposedly "new" evidence presented by Defendant involves the testimony and interviews of Watson's assistant, Charlotte Travaglia. Even if one ignores that this "new" evidence does not in any way demonstrate abuse of the grand jury process, supra, the record evidences that Travaglia was available to the Defendant before his conviction and Defendant could have raised this issue at that time. Travaglia was subpoenaed to the first trial by the both the defense, TR 2624, and Defendant then decided not to call her as a witness and released her from her appearance at the Courthouse, TR 2646. ("We have made a decision not to call Mrs. Travaglia as witness. . . .[W]e would like to advise her that she is free to go home today."). These portions of the record refute Defendant disingennous claim that he could not raise the issues related to Travaglia prior to the instant motion because "at the time of the trial [Travaglia] was in California undergoing treatment for cancer and [was] not available as a witness." Defendant's Motion at 8. Not surprisingly, the affidavits submitted by Defendant in support of his motion (including an affidavit by Travaglia) are silent on the issue of her alleged unavailability.

Because all of the facts and legal issues relating to purported grand jury abuse could have been raised by Defendant before trial, during trial, in post-trial motions, or in his appeal, Defendant is now barred from making an extraordinary, eleventh-hour attack on his conviction reliant on these issues. As discussed earlier, the time has passed for the filing of post-trial motions with the District Court when the motions do not rely on newly-discovered evidence. Although Defendant seeks to avoid this limitation by captioning his motion as a request for relief under 28 U.S.C. §2255, 4/ this ploy also fails. "[S]ection 2255 is not a substitute for direct appeal, and matters which could have been raised on appeal will not be considered." United States v. Samuelson, 722 F.2d 425, 427 (8th Cir. 1983). Accord. United States v. Marchese, 341 F.2d 782, 789 (9th Cir.) ("§2255 may not be invoked to relitigate questions which were or should have been raised on direct appeal"), cert. denied, 382 U.S. 817 (1965); Matysek v. United States, 339 F.2d 389, 391 (9th Cir. 1964), cert. denied, 381 U.S. 917 (1965). Thus, even if Defendant's second claim was founded in fact and law -- instead of failing on both points -- he cannot raise the issue for the first time in a post-appeal attack on his conviction.

C. The Location of the Prison

Defendant's third and final contention is equally frivolous. In this argument, Defendant contends that his two-year prison sentence has been imposed in an illegal manner because it will require him to "reside" outside the District of Nevada, in violation of 28 U.S.C. §134(b). This statute provides

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4/ Of course, Defendant is not properly entitled to relief under §2255 because motions under this section cannot be filed prior to his incarceration, supra.

that "[e]ach district judge . . . shall reside in the district or one of the districts for which he is appointed."

Defendant's contention is without merit because, under well-established legal principles, it is clear that Defendant's legal residence will remain in the District of Nevada regardless of the location of the penal institution to which he is designated to serve his sentence. In a frequently-cited decision on this issue, the Ninth Circuit Court of Appeals has explicitly held that "[o]ne does not change his residence to the prison by virtue of being incarcerated there." Cohen v. United States, 297 F.2d 760, 774 (9th Cir.), cert. denied, 369 U.S. 865 (1972). Rather, Defendant Claiborne will retain his legal residence in his pre-incarceration domicile, the District of Nevada, regardless of the place of his imprisonment. "A prisoner's residence is the district of his domicile before his incarceration." Turner v. Kelley, 411 F. Supp. 1331, 1332 (D. Kan. 1976). Accord. Urban Industries Inc. of Kentucky v. Thevis, 670 F.2d 981, 986 (11th Cir. 1982); Brimer v. Levi, 555 F.2d 656, 657-58 (8th Cir. 1977); Ellingburg v. Connett, 457 F.2d 240, 241 (5th Cir. 1972); United States v. Kahane, 396 F. Supp. 687, 697 (E.D.N.Y.), aff'd sub nom. Kahane v. Carlson, 527 F.2d 492, 494 (2d Cir. 1975); Dreyer v. Jalet, 349 F. Supp. 452, 465 (S.D. Tex. 1972), aff'd, 479 F.2d 1044 (5th Cir. 1973); Ott v. United States Board of Parole, 324 F. Supp. 1034, 1037 (W.D. Mo. 1971). Compare 580 F.2d 620, 622 (D.C. Cir. 1978).

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Thus, even while serving his prison sentence, Defendant will retain his legal residence in the District of Nevada, and there is not basis for attacking his sentence as a violation of 28 U.S.C. §134(b). 5/

IV. CONCLUSION

For the foregoing reasons, Defendant's motion should be denied.

Respectfully submitted,

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CERTIFIED TO BE A TRUE COPY
CAROL C. FITZGERALD, Clerk
United States District Court
By

5/ Even assuming arguendo that Defendant were correct in his contention that he should not be required to serve his sentence outside of Nevada, this would not require nullification of his sentence. Rather, if the Defendant continues to press this argument, his concern could be satisfied by making arrangements for him to serve his federal sentence at a state penal institution in Nevada.

AFFIDAVIT

I, Stephen Rybar, having been first duly sworn, depose and say that:

(1) I was employed by the Federal Bureau of Investigation as a Special Agent on behalf of the United States of America from November 23, 1970, to December 30, 1982.

(2) At no time did I plan, take part in, or have anything else to do with an alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(3) At no time did I receive, see, or have anything else to do with any evidence allegedly obtained during the alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(4) To the best of my information and belief, no such surreptitious entry of Harry E. Claiborne's home took place. Further, affiant sayeth not.

Stephen Rybar

Subscribed and sworn to before me this 1st day of May, 1986.

Michael B Growney
Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My commission expires 7/31/89

AFFIDAVIT

I, Dennis Caputo, having been first duly sworn, depose and say that:

(1) I am employed by the Las Vegas Metropolitan Police Department as a duly sworn Law Enforcement Officer in Las Vegas, Nevada from June 5, 1963, to present.

(2) At no time did I plan, take part in, or have anything else to do with an alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(3) At no time did I receive, see, or have anything else to do with any evidence allegedly obtained during the alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(4) To the best of my information and belief, no such surreptitious entry of Harry E. Claiborne's home took place. Further, affiant sayeth not.

Dennis Caputo

Dennis Caputo

Subscribed and sworn to before me this 6 day of May, 1986.

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
Alexander A. Siciliano
My Appt. Expires Mar. 22, 1980

Notary

AFFIDAVIT

I, Kenneth E. Green, having been first duly sworn, depose and say that:

(1) I have been employed by the Internal Revenue Service as a Special Agent in Las Vegas, Nevada from March 20, 1983 to the present.

(2) Special Agent Kenneth W. Bethke and I interviewed Clifford D. Isbell On July 24, 1985.

(3) Mr. Isbell stated that he was approached by Lake Headley who said he was working as a private detective for attorney Dominic Gentile. Mr. Isbell stated that Mr. Headley wanted him (Isbell) to admit to participating in an illegal break-in of the residence of Harry Claiborne.

(4) Isbell stated that he told Mr. Headley that he had not participated in any break-in and asked Mr. Headley why he wanted him to say he had.

(5) Mr. Isbell stated that Mr. Headley then said that if Benny Binion could be convinced there was evidence which would help his old friend Harry Claiborne, Mr. Binion would be willing to put up one million dollars to help with Judge Claiborne's defense.

(6) Mr. Isbell stated that he asked Mr. Headley how the one million dollars from Mr. Binion was to be "cut up" if he decided he was interested and Mr. Headley said he would get back to him at a later date.

Further, affiant sayeth not.

Kenneth E. Green
KENNETH E. GREEN

Subscribed and sworn to before me the 6th day of May, 1986.

Michael B Growney
Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1989

AFFIDAVIT

I, Kenneth W. Bethke, having been first duly sworn, depose and say that:

(1) I have been employed by the Internal Revenue Service as a Special Agent in Las Vegas, Nevada from November, 1977 to the present.

(2) Special Agent Kenneth E. Green and I interviewed Clifford D. Isbell On July 24, 1985.

(3) Mr. Isbell stated that he was approached by Lake Headley who said he was working as a private detective for attorney Dominic Gentile. Mr. Isbell stated that Mr. Headley wanted him (Isbell) to admit to participating in an illegal break-in of the residence of Harry Claiborne.

(4) Isbell stated that he told Mr. Headley that he had not participated in any break-in and asked Mr. Headley why he wanted him to say he had.

(5) Mr. Isbell stated that Mr. Headley then said that if Benny Binion could be convinced there was evidence which would help his old friend Harry Claiborne, Mr. Binion would be willing to put up one million dollars to help with Judge Claiborne's defense.

(6) Mr. Isbell stated that he asked Mr. Headley how the one million dollars from Mr. Binion was to be "cut up" if he decided he was interested and Mr. Headley said he would get back to him at a later date.

Further, affiant sayeth not.

Kenneth W Beth
KENNETH W. BETHKE

Subscribed and sworn to before me the 6th day of May, 1986.

Michael B Growney
Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1989

AFFIDAVIT

I, Joseph Yablonsky, having been first duly sworn, depose and say that:

(1) I was employed by the Federal Bureau of Investigation as a Special Agent on behalf of the United States of America from February 18, 1952 to December 30, 1983.

(2) At no time did I plan, take part in, or have anything else to do with an alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(3) At no time did I receive, see, or have anything else to do with any evidence allegedly obtained during the alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(4) To the best of my information and belief, no such surreptitious entry of Harry E. Claiborne's home took place. Further, affiant sayeth not.

Joseph Yablonsky
Joseph Yablonsky

Subscribed and sworn to before me this 6th day of May, 1986.

OFFICIAL SEAL
BARBARA ERVIN
NOTARY PUBLIC - CALIFORNIA
SAN FRANCISCO COUNTY
My comm. expires DEC 27, 1989

Barbara Ervin
Notary

25.

AFFIDAVIT

I, Kent Clifford, having been first duly sworn, depose and say that:

(1) I was employed by the Las Vegas Metropolitan Police Department as a duly sworn law enforcement officer in Las Vegas, Nevada, from June, 1970, to January 2, 1983.

(2) At no time did I plan, take part in, or have anything else to do with an alleged surreptious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(3) At no time did I receive, see, or have anything else to do with any evidence allegedly obtained during the alleged surreptious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.

(4) To the best of my information and belief, no such surreptious entry of Harry E. Claiborne's home took place. Further, affiant sayeth not.

Kent Clifford

Kent Clifford

Subscribed and sworn to before me this 6th day of May, 1986.

Michael B Growney

Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1989

AFFIDAVIT

I, Steven A. Shaw, having been first duly sworn, depose and say:

1. I was employed by the Department of Justice as a trial attorney in the Public Integrity Section of the Criminal Division from February 1982 to April 1985.
2. During the course of my employment with the Public Integrity Section, I was assigned to an investigation of possible crimes committed by Harry E. Claiborne, Chief, Judge. U. S. District Court for the District of Nevada.
3. At no time did I plan, take part in, or have anything else to do with an alleged surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.
4. At no time did I receive, see, or have anything to do with any evidence allegedly obtained during the surreptitious entry of Harry E. Claiborne's home at 1908 Plaza De La Cruz, Las Vegas, Nevada.
5. To the best of my information and belief, no such surreptitious entry of Harry E. Claiborne's home took place.
6. On or about July 7, 1983, I drafted a subpoena calling for Harry E. Claiborne to produce certain books and records. Paragraph 12 of that subpoena called for Judge Claiborne to produce "personal diaries kept . . . at any time between September 1, 1978 and the date of this subpoena". I included Paragraph 12 pursuant to a routine practice I had developed

relating to the drafting of subpoenas duces tecum. At the time I drafted the language contained in Paragraph 12, I had no knowledge that any such diary in fact existed.

7. The first time I ever saw a copy of a small lined tablet allegedly containing records of certain receipts of Harry E. Claiborne's was at the time it was given to a representative of the FBI by a representative of Oscar Goodman a few days prior to the first trial, in early 1984.

STEVEN A. SHAW

Sworn and deposed before me this 6th day of May, 1986.

Elaine R. Cole
Notary Public

[illegible]

AFFIDAVIT

I, Richard T. Jesinger, having been first duly sworn, depose and say that:

(1) I am employed by the Federal Bureau of Investigation as a Special Agent on behalf of the United States of America from June 16, 1969, to present.

(2) I have read the affidavit of Jerry D. Watson dated May 1, 1986, attached to the motion (1) to vacate judgment and sentence; (2) for evidentiary hearing; and (3) for discovery proceedings filed on behalf of Judge Harry E. Claiborne on May 5, 1986, in the United States District Court for the District of Nevada in case number CR-R-83-57.

(3) In paragraph six (6) of Watson's affidavit he alleges during an interview at his Las Vegas, Nevada office (shortly after being served a Grand Jury subpoena) by myself and Special Agent Donald Skelton, Internal Revenue Service, the questions by Agent Skelton went from "smart remarks and scathing sarcasm to outraged hostility". I categorically state the demeanor, speech, and actions of Agent Skelton were professional in all aspects.

(4) In paragraph eight (8) of Watson's affidavit he alleges prior to his appearance before a Federal Grand Jury in Portland, Oregon, on March 16, 1983, he was detained in a conference room by myself and Special Agent Donald Skelton. Furthermore, in response to a remark by Watson, Watson alleges "Jessinger's (sic) hostility appeared on the breaking point and he began to yell that the full force of both services (FBI and IRS) was thrown into these charges of misconduct and wrongdoing and it applied equally to Judge Claiborne as it did to anyone else. It was apparent from his facial expression that he had a burning hatred towards Judge Claiborne". I categorically deny my demeanor, speech, or

actions were anything but professional.

(5) In paragraph nine (9) of Watson's affidavit he again alleges my and Agent Skelton's interview of Watson at his Las Vegas, Nevada office "...followed the same pattern of the previous interviews: sarcasm and open hostility". I categorically deny my or Agent Skelton's demeanor, speech, or actions were anything but professional.

(6) In paragraph eleven (11) of Watson's affidavit, he alleges he was "interrogated" prior to a June 8, 1983, Grand Jury appearance by myself and Special Agents Leo Halper and Don Skelton of the Internal Revenue Service, during which time Agent "Halper then jumped up from the table and angrily leaned over the table with his face contorted and his hands clenched". Watson further alleges on June 15, 1983, myself and Agent Halper contacted Watson at his Las Vegas, Nevada office and during this contact Agent Halper allegedly stated to Watson, "I guess you think you are some kind of smart son-of-a-bitch and that you know how to cover your ass"; Watson alleged other comments of profanity were made by Agent Halper. I categorically deny my or Special Agent Skelton's or Halper's demeanor, speech, or actions were anything but professional.

Further, affiant sayeth not.

Richard T. Jesinger
Richard T. Jesinger

Subscribed and sworn to before me this 7 day of May, 1986.

Michael B Growney
Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1989

AFFIDAVIT OF DONALD C. SKELTON

I, DONALD C. SKELTON, being first duly sworn, depose and say that:

1. I have been a special agent with the Internal Revenue Service since August of 1962.

2. I was detailed to the Department of Justice to assist in the investigation of Judge Harry E. Claiborne in October of 1982.

3. I have read the affidavit of Jerry D. Watson, dated April 30, 1986, which is attached to a motion (1) to Vacate Judgment and Sentence; (2) for Evidentiary Hearing; and (3) for Discovery Proceedings, filed on behalf of Judge Harry E. Claiborne.

4. Item Number 6 of Mr. Watson's affidavit states that Special Agent Richard Jessinger and I interviewed him on March 9, 1983, at which time our "questions were brittle, sharp and their comments sarcastic" and that I went from "smart remarks and scathing sarcasm to outraged hostility."

Special Agent Jessinger and I actually interviewed Mr. Watson on March 8, 1983. Mr. Watson's characterization of the interview is not accurate. The interview was businesslike and congenial.

5. Item Number 6 of Mr. Watson's affidavit also states that I told Mr. Watson he "had better make sure" he was familiar with 18 USC 1001 and 26 USC 7206. I suggested that he acquaint himself with those code sections in an unthreatening manner.

6. Item Number 6 of Mr. Watson's affidavit also states that: "He then said, 'We are officers and agents of the court and grand jury'." Neither Special Agent Jessinger nor I made that statement.

7. Item Number 7 of Mr. Watson's affidavit states that:

"It was clear that Skelton had been designated as the person to take personal charge of me, and he did." That statement is not correct. No such designation was made.

8. Item Number 7 of Mr. Watson's affidavit also states that on March 16, 1983, Mr. Skelton "continually harassed me by sarcastic remarks and his hostility became so frightening to me that I just turned around and handed him all the records without finishing copying them." That statement is incorrect. Mr. Watson was permitted to copy any documents he wanted, but decided he did not need or want all of them. I also told him he could request copies of any additional documents he did not copy. To my knowledge, he made no such request.

9. Item Number 8 of Mr. Watson's affidavit also states:

"Jessinger's hostility appeared on the breaking point and he began to yell that the full force of both services (FBI and IRS) was thrown into these charges of misconduct and wrongdoing and it applied equally to Judge Claiborne as it did to anyone else. It was apparent from his facial expressions that he had a burning hatred towards Judge Claiborne."

That statement is incorrect. I have never seen Special Agent Jessinger conduct himself in such a manner in front of Mr. Watson or anyone else.

10. Item Number 8 of Mr. Watson's affidavit states that:

"I was then escorted to the jury room and testified. By this time, I was a mental and physical wreck, brought about by the psychological harassment of these individuals."

This statement is not correct. There was no psychological harassment, and Mr. Watson seemed remarkably at ease as compared to most witnesses prior to his grand jury testimony.

11. Item Number 9 of Mr. Watson's affidavit states that prior to June 8, 1983, Special Agent Jessinger and I conducted a "searching interrogation of all of the details of how Judge Claiborne's return was prepared" and that "this meeting followed the same pattern of the previous interviews: sarcasm and open hostility" prior to his Reno grand jury appearance.

There was no such interrogation, but we may have contacted Mr. Watson to serve a subpoena requiring his appearance before the Reno grand jury.

12. Item Number 9 of Mr. Watson's affidavit states that:

"The next day, Agent Skelton came to my office alone. He advised me that if I was withholding any information that I had better not do it. He advised me to check my file and make sure I had not forgotten anything and to be very careful of what I said when I appeared before the grand jury in order to avoid perjury charges in the future. He asked me if I had a lawyer. He advised me that I could very well be indicted with Judge Claiborne on conspiracy charges and then he added, 'Jerry, why stick your neck out for Judge Claiborne. Is it really worth it'?"

This alleged interview did not occur. I never interviewed Mr. Watson when there was not another special agent present.

13. Item Number 11 of Mr. Watson's affidavit states that:

"Halper then jumped up from the table and angrily leaned over the table with his face contorted and his hands clenched. Agent Skelton quickly moved in and put his hand on my shoulder and said, 'Jerry, we don't want to see you get into trouble. If you go out on a limb for Judge Claiborne, he is going to leave you hanging there and just walk away. You are too smart to take the fall for him. No one will be able to save you or help you.' He then said we have talked to Mrs. Travaglia and you are going to be very surprised at what she has testified to."

There was no such display of anger by Special Agent Halper and I did not put my hand on Mr. Watson's shoulder. Mr. Watson's quote regarding my conversation with him is not accurate, although I did have a conversation with him during which I suggested that he not perjure himself for Judge Claiborne's benefit. I did not tell Mr. Watson that we had talked to Mrs. Travaglia. In fact, Mr. Watson asked me several times if we had talked to or found Mrs. Travaglia and said that he was looking for her also. I made it a point not to respond to his questions about Mrs. Travaglia's whereabouts or whether we had interviewed her.

14. Item Number 11 of Mr. Watson's affidavit states:

"When I was finally called before the grand jury, I was in such a mental state that until this date, the whole matter of my actual grand jury appearance seems like some vague dream. I couldn't remember certain facts about him tax return or the preparation of the same."

I observed Mr. Watson before his grand jury appearance. At that time he appeared very relaxed, calm and talkative.

15. Item Number 12 of Mr. Watson's affidavit states that on July 28, 1983:

"My attorney, in my presence, requested a copy of my previous testimony since he felt by reason of the harassment of the agents before my appearance as well as my illness that I should have an opportunity to correct and clarify any confusing and incorrect testimony made under those circumstances. At that time, Mr. Shaw was accompanied by two criminal investigators of the IRS. When Mr. Semenza made his request for the transcript, Mr. Shaw went along with the two criminal investigators and returned announcing that one transcript was 80 pages long and the other one 90 pages long. Mr. Shaw then stated to Mr. Semenza that he would furnish him the transcript for me to review if I agreed to testify at 1 p.m. and he attempted to get a guarantee from me and Mr. Semenza that I would indeed testify at 1 p.m. Both Mr. Semenza and myself explained to Mr. Shaw that we doubted we could review the transcripts in that period of time but that we would try. At that point, one of the IRS criminal investigators with Mr. Shaw said to Mr. Shaw in our presence and hearing; 'You should inform Mr. Watson right now that he is a target of this federal grand jury investigation and you should inform Mr. Watson of what that fact means.' Mr. Shaw then refused to give us the transcript and Mr. Semenza did not allow me to testify."

I was one of the Internal Revenue Service criminal investigators Mr. Watson refers to as being present with he and his attorney, Mr. Semenza. Neither Special Agent Leo B. Halper, who was also present, nor I made any statements to Mr. Watson or Mr. Semenza regarding Mr. Watson being a target of a grand jury investigation. Mr. Shaw told Mr. Watson and Mr. Semenza that Mr. Watson may now be a subject of the grand jury investigation.

16. Item Number 12 of Mr. Watson's affidavit states:

"That evening (July 28), when I arrived at the McCarran International Airport in Las Vegas, Nevada, and approached the baggage turnstile to get my baggage, Agents Halper and Skelton walked up and began to harass me. Agent Halper mainly did the talking. He demanded to know who was paying my attorney, Lawrence Semenza, and when I replied that I was still working out an arrangement with Mr. Semenza, Halper replied, 'Bullshit. Harry Claiborne is paying Semenza and he is Claiborne's attorney. We have known for two weeks that Semenza was being sent in. If you are smart, you had better get you a lawyer that is representing you. You are digging a deeper hole and nobody is going to bail you out. You are a liar and we can prove it. Your attorney Semenza better make damn clear to you what is meant by a target of a grand jury investigation and the consequences of lying and covering up for Judge Claiborne.' I then asked what they thought I was lying about and Halper responded, 'You know damned well what we are talking about. You came up with a very clever explanation of the missing income and we believe the documents are a lie and we can prove it. You still have a chance to save your skin. Just come on down to the office and tell the truth and you are off the hook. Otherwise, you are in big trouble'."

Special Agent Halper and I did encounter Mr. Watson at the McCarran International Airport in Las Vegas, Nevada on July 28, 1983. Mr. Watson initiated a conversation by saying that he hoped there was no hostility between us. Special Agent Halper told Mr. Watson that he did not see how Watson could expect us not to be upset with him because we thought he had lied to us about the facts regarding the preparation of Judge Claiborne's income tax returns and the one page document he and Judge Claiborne had allegedly found regarding the reporting of legal fees.

Special Agent Halper asked Mr. Watson who had first recommended to him to hire Mr. Semenza as his attorney. Mr. Watson replied that it was a friend and that we should know he wasn't going to say who it was.

Special Agent Halper asked Mr. Watson who was going to pay Mr. Semenza's fee. Mr. Watson stated that he supposed he was going to but at that point, the fee had not yet been discussed. Mr. Watson stated that he expected to send a bill to his client for his and his attorney's time and expenses, although he had not yet discussed it with Judge Claiborne.

Special Agent Halper told Mr. Watson that if he ever wanted to sit down and tell us the whole truth he should give us a call.

Special Agent Halper did not make the other statements attributed to him by Mr. Watson in Item Number 12.

Donald C Skelton
DONALD C. SKELTON

Subscribed and sworn before
me this 7 day of
May ,1986

Michael B Growney

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1989

AFFIDAVIT OF LEO B. HALPER

I, LEO B. HALPER, being first duly sworn, depose and say that:

1. I have been a Special Agent with the Internal Revenue Service, Criminal Investigation Division since January of 1972.

2. During the course of my duties, I was assigned an investigation of the income tax liability of Judge Harry E. Claiborne.

3. I have read the affidavit of Jerry D. Watson dated April 30, 1986 which is attached to a motion (1) to vacate judgement and sentence; (2) for evidentiary hearing; and (3) for Discovery Proceedings filed on behalf of Judge Harry E. Claiborne.

4. Paragraph No. 11 of Mr. Watson's affidavit states:

"While waiting to appear before the Reno grand jury on June 8, 1983, I was approached by Agent Skelton and taken to a private office. When we walked into the office, Agent Jessigner and two other men were there. One left and the other men stayed and he identified himself as Agent Halper. I am not sure of the correctness of this name. After identifying himself, this person told me that he had been recently assigned to the case and he had reviewed the transcript of my testimony before the Portland grand jury and since there were so many contradictions and even outright falsehoods in my testimony, it was necessary for him to further interrogate me."

I did not make these statements.

Mr. Watson also states in Paragraph No. 11:

"This remark scared me to death and I said to him, "Am I under investigation or a target of this grand jury investigation?" He then said, "I am not aware of you being under investigation at this time." You will be advised should you become a target. I then said, "That isn't good enough. I do not feel that I should answer any questions at this time." Halper then jumped up from the table and angrily leaned over the table with his face contorted and his hands clenched."

I did tell Mr. Watson that I was not aware of his being under investigation at that time.

I did not jump up from the table and angrily lean over the table.

Mr. Watson further states in Paragraph No. 11:

"On June 15, 1983, at about 5 p.m., FBI Agent Jessinger and the special agent that I believe was named Halper, came to my office. Halper stated, "I guess you think you are some kind of a smart son-of-a-bitch and that you know how to cover your ass." and he yelled about the telegram being sent as part of a conspiracy between me and Judge Claiborne and demanded to see a copy of the telegram which I furnished him. All of these statements were made in unrestrained hostility and anger. After fifteen minutes of harassment, I finally said, "I will not discuss anything further with you people without my attorney present." Halper then said, "How come you were so god damned willing to talk so god damned freely in the past and you go around shooting your god damned mouth off to the press and now all of a sudden you don't want to talk without your attorney present?" I then replied I have asked to reappear before the grand jury and correct my testimony and I will do it with them and if I have anything to say, I will say it to the grand jury, not you. They left my office and as Halper went out the door he yelled, "I will be back. You can bet your ass I will be back." He said, "You're digging yourself a big hole and you are in big trouble."

I did not make any of the foregoing statements.

Mr. Watson states in Paragraph No. 12:

"After sending the wire to the foreman of the grand jury and Mr. Shaw, I was subpoenaed to appear before the Reno grand jury on July 6, 1983. This supboena was issued to allow me to correct my testimony. However, on June 21, 1983, Mr. Stephen A. Shaw of the Justice Department cancelled the subpoena by letter.

On July 23, 1983, I was served with a subpoena to appear before the federal grand jury in Reno, Nevada, on July 28, 1983 at 9:30 a.m. Prior to the subpoena, I had engaged Mr. Lawrence J. Semenza, an attorney for Reno, Nevada, to act as my counsel with reference to further grand jury proceedings. On July 28, 1983, at 9:30 a.m., I appeared with Mr. Semenza at the grand jury room located in the federal building, Reno, Nevada to testify with reference to the telegram sent to Mr. Shaw and the foreman of the grand jury and other matters connected with my previous testimony.

My attorney, in my presence, requested a copy of my previous testimony since he felt by reason of the harassment of the agents before my appearance as well as my illness that I should have an opportunity to correct and clarify any confusing and incorrect testimony made under those circumstances. At that time, Mr. Shaw was accompanied by two criminal investigators of the IRS. When Mr. Semenza made his request for the transcript, Mr. Shaw went along with the two criminal investigators and returned announcing that one transcript was 80 pages long and the other one 90 pages long. Mr. Shaw then stated to Mr. Semenza that he would furnish him the transcript for me to review if I agreed to testify at 1 p.m. and he attempted to get a guarantee from me and Mr. Semenza that I would indeed testify at 1 p.m. Both Mr.

Semenza and myself explained to Mr. Shaw that we doubted we could review the transcripts in that period of time but that we would try. At that point, one of the IRS criminal investigators with Mr. Shaw said to Mr. Shaw in our presence and hearing; "You should inform Mr. Watson right now that he is a target of this federal grand jury investigation and you should inform Mr. Watson of what that fact means." Mr. Shaw then refused to give us the transcript and Mr. Semenza did not allow me to testify."

I was one of the Internal Revenue Service criminal investigators Mr. Watson refers to as being present with he and his attorney, Mr. Semenza. Neither Special Agent Donald Skelton, who was also present, nor I made any statements to Mr. Watson or Mr. Semenza regarding Mr. Watson being a target of a grand jury investigation. Mr. Shaw told Mr. Watson and Mr. Semenza that Mr. Watson may now be a subject of the grand jury investigation.

Mr. Watson further states in Paragraph No. 12 of his affidavit:

"That evening (July 28), when I arrived at the McCarran International Airport in Las Vegas, Nevada, and approached the baggage turnstile to get my baggage, Agents Halper and Skelton walked up and began to harass me. Agent Halper mainly did the talking. He demanded to know who was paying my attorney, Lawrence Semenza, and when I replied that I was still working out an arrangement with Mr. Semenza, Halper replied, "Bullshit. Harry Claiborne is paying Semenza and he is Claiborne's attorney. We have known for two weeks that Semenza was being sent in. If you are smart, you had better get you a lawyer that is representing you. You are digging a deeper hole and nobody is going to bail you out. You are a liar and we can prove it. Your attorney

Semenza better make damn clear to you what is meant by a target of a grand jury investigation and the consequences of lying and covering up for Judge Claiborne." I then asked what they thought I was lying about and Halper responded, "You know damned well what we are talking about. You came up with a very clever explanation of the missing income and we believe the documents are a lie and we can prove it. You still have a chance to save your skin. Just come on down to the office and tell the truth and you are off the hook. Otherwise, you are in big trouble."

Special Agent Skelton and I did encounter Mr. Watson at the McCarran Interrational Airport in Las Vegas, Nevada on July 28, 1983. Mr. Watson initiated a conversation with us. He started the conversation by saying that he hoped there was no hostility between us. I told Mr. Watson that I did not see how he could expect us not to be upset with him because we thought he had lied to us about the facts regarding the preparation of Judge Claiborne's income tax returns and the one page document he and Judge Claiborne had allegedly found regarding the reporting of legal fees.

I asked Mr. Watson who had first recommended to him to hire Mr. Semenza as his attorney. Mr. Watson replied that it was a friend and that we should know he wasn't going to say who it was.

I asked Mr. Watson who was going to pay Mr. Semenza's fee. Mr. Watson stated that he supposed he was going to but at that point, the fee had not yet been discussed. Mr. Watson stated that he expected to send a bill to his client for his and his attorney's time and expenses, although he had not yet discussed it with Judge Claiborne.

I told Mr. Watson that if he ever wanted to sit down and tell us the whole truth he should give us a call.

I did not make the other statements attributed to me by Mr. Watson in Paragraph No. 12.

Leo B Halper
LEO B. HALPER

Subscribed and sworn before
me this 7 day of
MAY, 1986

Michael B Growney

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1986

AFFIDAVIT

I, Richard T. Jesinger, having been first duly sworn, depose and say that:

(1) I am employed by the Federal Bureau of Investigation as a Special Agent on behalf of the United States of America from June 16, 1969, to present.

(2) Attached to this affidavit is a Federal Bureau of Investigation interview report (FD-302) of Charlotte Travaglia, 3414 Sylvia, Apartment Number 4, Las Vegas, Nevada, dated June 17, 1983.

(3) The interview report was recorded by me, and the information contained therein is correct and accurate to the best of my knowledge.

Further, affiant sayeth not.

Richard T. Jesinger
Richard T. Jesinger

Subscribed and sworn to before me this seventh day of May, 1986.

Michael B. Growney
Notary

Michael B. Growney
NOTARY PUBLIC
State of Nevada, Clark County
My appointment expires July 31, 1990

FEDERAL BUREAU OF INVESTIGATION

1

Date of transcription 6/23/83

Charlotte Travaglia, 3414 Sylvia, apartment #4, Las Vegas, Nevada, was asked to examine a xerox copy of a "worksheet" that was supposedly prepared for her to be utilzed in completing the 1980 federal income tax form for Harry Claiborne.

Upon examing the form Charlotte Travaglia advised the items listed as number one and number two and number three appeared to have been placed on the form by Jerry Watson. She feels this is his handwriting.

As for item number four she also believes this is Watson's handwriting with the exception of the wording "interest earned on" which she stated she placed on the form in her handwriting. The boxes on the form as well as the other diagrams appear to be consistent with the manner in which Watson would "doodle" on forms or take down information. After items number four the words "also +345" were put on the form by her.

Items number five and number six are in her handwriting. She also advised the "tick marks" appearing on the form are also hers as is the asterisk mark preceding the figure $88,500 in item number two.

When asked if she had this form which spells out the income of $88,500 why she did not place that in the income column on the federal income tax form. She stated she cannot answer that question as she does not know why she would not have placed it in the income. She stated she was never told not to declare the $88,500 as income; and she added she was never told to include it.

Based on the questions she wrote out in item number five on the form she believes she must have had other documents or worksheets that she was making reference to. However, she cannot specifically recall this particular worksheet and therefore cannot recall if there were other documents but felt there must have been.

Investigation on 6/17/83 at Las Vegas, Nevada File # LV 58-138-C-3-20

by SA Richard T. Jesinger:imb Date dictated 6/17/83

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

She advised that she normally writes in pencil rarely using ink.

Travaglia stated when she first gained employment with Jerry Watson at his firm she had a discussion with Jerry Watson and Linda Lamb. She informed both of them that she was not fully acquainted with all the Internal Revenue Service (IRS) rules and regulations and wanted to know if there would be someone there to review her work. Watson told her that her work would be checked as Watson would help her. According to Travaglia there was no one else but Watson in the firm who would be reviewing her work.

During her employment she stated to Watson that she would volunteer pay out of her commission if her son could review her work. Watson would not allow this.

During the preparation of the tax return for Harry Claiborne for the year 1980 she recalls stating to Watson that she did not handle it right and wanted Watson to review it. She and Watson engaged in at least two or three discussions concerning the preparation of the return. She stated she had questions about it and wanted him to check it over as she was not sure it was prepared properly. When she would ask Watson to review the return she stated Watson would respond with "He'll get to it later" or "He would get back to her".

Travaglia stated that when she completed preparation of this form she definitely wanted Watson to review it as she felt there was problems with it, and she placed the file with the completed form on his desk along with six other files for Watson to review.

Travaglia continued to state she had no idea why the $88,500 figure was not included on the income portion of the tax return.

-350 (Rev. 8-8-81)

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(Indicate page, name of newspaper, city and state.)
LAS VEGAS, NEV. · SUN
p. 1

Date
Edition 5/7/86

Title

Character
or
Classification 58B-138
Submitting Office LAS VEGAS

Indexing

DA: Claiborne break-in probe at dead end

By JEFFREY M. GERMAN
SUN Staff Writer

Clark County District Attorney Robert Miller said Tuesday his investigation into a reported FBI-Metro Police break-in at the home of U.S. District Judge Harry Claiborne has reached a dead end.

"We've reviewed everything we could at this point, and we've concluded the active aspects of our investigation," Miller told the SUN.

But Claiborne's lawyer, Oscar B. Goodman, questioned why the case hasn't been brought before the Clark County Grand Jury in the wake of new evidence raised in documents filed in federal court Monday.

"I don't understand why the matter isn't being pursued by the grand jury," Goodman said. "It's not dead. It strikes at the heart of what we're trying to do to get the truth out."

Goodman filed a strongly worded motion Monday in Reno federal court to set aside Claiborne's tax evasion conviction.

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Probe of judge's break-in seemingly at dead end

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because of "outrageous" government conduct in the controversial Claiborne investigation.

Claiborne, 66, the first federal judge convicted while serving on the bench, has been ordered to begin serving a two-year jail term by May 16. He has refused to resign, prompting moves in Congress to initiate impeachment proceedings against him.

Accompanying the motion to set aside Claiborne's conviction was a sworn affidavit by private investigator Lake Headley indicating a second burglary suspect is willing to come forward and testify.

The first suspect, James D. Johnson, a onetime police informant serving a four-year jail term for slot cheating, has cooperated with investigators in the district attorney's probe, but he recently failed a polygraph exam. Johnson filed a sworn affidavit in court Monday insisting the allegations are true.

In his eight-page affidavit, Headley said the second suspect, Clifford D. Isbell, confirmed details of the 1981 burglary at Claiborne's Spanish Oaks home and told him he will testify if subpoenaed.

According to the story brought to light so far, Johnson and Isbell, both onetime police informants, have indicated former FBI chief Joseph Yablonsky ordered the break-in to steal copies of the judge's tax documents later used against him at his trial. An FBI agent and a Metro Police intelligence sergeant reportedly were the other two members of the burglary team.

"Why don't they call Mr. Isbell and ask him the relevant questions under oath?" Goodman asked. "Why don't they call Mr. Yablonsky?"

Headley, a private investigator for 24 years, echoed those words.

"I don't see how any investigation can accept the word of the suspects that they didn't do it," he said.

"There's got to be a way to put these people under oath. Everything we've said has been under oath. The suspects have never said anything under oath."

Miller said Isbell, who is cooperating with state gaming agents in another investigation at Vegas World, has never told his investigators he has knowledge of the burglary.

"He's never given us an indication at all that he has any direct information to provide," Miller added.

Sources close to the case said Isbell and his lawyer previously have indicated Isbell had no knowledge of the burglary. Yablonsky has publicly denied the allegations, and the FBI in Washington has called them "absurd."

Although Miller admits his probe has failed to substantiate the reported FBI break-in, he says the case still is open and he will review any new evidence that surfaces.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct of the foregoing Government's Opposition to Defendant's Motion to Vacate Judgment and Sentence and for Evidentiary Hearing and Discovery was forwarded via DHL couriers to Oscar B. Goodman, Esq., 520 S. Fourth Street, Las Vegas, Nevada 89101-6593, this 8th day of May 1986.